79-952

Supreme Court, U. S.
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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1979

EDDIE C. THOMAS,

Petitioner,

vs.

THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, WILLIAM H. SKINNER, J. FRANK HALEY, and RALPH MILES, as members and as constituting the Review Board of the Indiana Employment Security Division,

and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The petitioner, Eddie C. Thomas, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Indiana entered in this proceeding on July 18, 1979.

OPINIONS BELOW

On February 24, 1976, the referee of the Indiana Employment Security Division entered his decision on the instant case. The Review Board of the Indiana Employment Security Division affirmed the referee's decision on November 29, 1976. Petitioner appealed and on October 26, 1978 the Court of Appeals of Indiana rendered a decision favorable to the appellant, which decision is reported in *Thomas* v. *Review Board of Indiana Security Division* ..... Ind. App. ....., 381 N.E.2d 888 (1978). Rehearing was denied in an unpublished order of November 22, 1978. The opinion of the Supreme Court of Indiana entered on July 18, 1979, is reported at ..... Ind. ....., 391 N.E.2d 1127 (1979). A petition for rehearing was subsequently denied in an unpublished order of September 20, 1979.

JURISDICTION

The judgment to be reviewed is the July 18, 1979, opinion and order of the Supreme Court of Indiana, which reversed the decision rendered by the Court of Appeals of Indiana on the instant case on October 26, 1978. Jurisdiction is conferred on this Court by 28 U.S.C.A. §1257 (3).

QUESTION PRESENTED FOR REVIEW

Whether the application of the disqualifying provisions of the Indiana Employment Security Act, Indiana Code 22-4-15-1, (Burns Code Ed., 1974) to the petitioner, a Jehovah's Witness, constitutes a denial of his First Amendment right to the free exercise of religion when he voluntarily terminated his employment in an armament factory because his religious beliefs prevented him from

participating in the production of armaments or in any war related activities.

STATUTES AND AMENDMENTS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Constitution of the United States, Amendment I

"With respect to benefit periods including extended benefit periods established subsequent to July 6, 1974, and before July 3, 1977, an individual who has voluntarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause shall be ineligible for waiting period or benefit rights for the week in which the disqualifying separation occurred and until he has subsequently earned remuneration in employment equal to or exceeding the weekly benefit amount of his claim in each of ten (10) weeks. The weeks of a disqualification period remaining at the expiration of an individual's benefit period will be carried forward to an extended benefit period or to the benefit of a subsequent claim only if the first week of such extended benefit period or subsequent benefit period falls within ten (10) consecutive weeks from the beginning of the disqualification period imposed on the prior claim."

Indiana Employment Security Act, Chapter 15, Section 1, Indiana Code 22-4-15-1, (Burns Code Ed., 1974).

STATEMENT OF THE CASE

The petitioner, Eddie C. Thomas, was employed as a chainman hooker by respondent, Blaw-Knox Foundry and Machinery, Inc. (hereinafter referred to as Blaw-Knox) for approximately a year. He performed his job satisfactorily in the Roll Foundry, and when this division of the company was permanently closed in November, 1975, he was transferred to another department where he began working in the production of turrets for tanks. This division was also know as the turret line. Upon commencing his job in that department, the petitioner, a Jehovah's Witness, realized that his new job directly involved the manufacture of armaments, an activity strictly prohibited by his religion. After realizing that all other departments of the company were engaged in the production of items used in the advancement of war, and after unsuccessfully attempting to obtain a law-off, the petitioner voluntarily terminated his employment with Blaw-Knox in accordance with his religious beliefs. (App. 3a)

Thomas filed a claim for unemployment compensation benefits on November 6, 1975, the same day he quit his job. An administrative hearing before a referee was held on January 27, 1976; petitioner appeared and testified without counsel. Petitioner was first represented by counsel at the Court of Appeals level. In his decision, the referee concluded that the petitioner "did quit due to his religious convictions, but that this was not good cause in connection with the work." (App. 3a) A timely appeal to the Indiana Employment Security Division Review Board (hereinafter referred to as Board) was filed. In its decision of November 29, 1976, the Board also concluded that petitioner "left his employment voluntarily because his religious beliefs as a Jehovah's Witness would

not allow him to continue to work producing arms, after being transferred from his original department which was not engaged in the manufacture of items used in the advancement of war." (App. 5a) However, the Board affirmed the referee's decision.

At this point, the Legal Aid Society of Gary, Inc., entered the case and an appeal was filed before the Court of Appeals. Appellant Thomas alleged that the Board had erred in concluding that he quit his employment without good cause in connection with the work, that the denial of unemployment benefits in this case violated his First Amendment right to the free exercise of religion, and that there was no compelling state interest to justify such an infringement. In the October 26, 1978 decision, the Court of Appeals held:

> "Under the authority of *Sherbert,* we are compelled to hold that the disqualifying provision of I.C. 22-4-15-1 (Burns Code Ed. 1974), as it applies to Thomas, casts an impermissible burden on his First Amendment guarantee to the free exercise of his religion. Because the Board has conceded that no "compelling state interest" exists to justify such a burden, we must hold that the statute is unconstitutional as applied to Thomas.
>
> The judgment is reversed and the cause remanded with directions that the Board enter an award not inconsistent with this opinion." (App. 19a)

A Petition for Rehearing was denied without opinion on November 22, 1978. (App. 25a)

The Indiana Court of Appeals decision came before the Supreme Court of Indiana on a Petition to Transfer filed by the Board in a 3-2 decision. In a decision rendered on July 18, 1979, the Court reversed the Appellate

Court. Associate Justice Pivarnik delivered the opinion of the Court, two Justices concurring with him. Justices Hunter and DeBruler dissented and wrote separate opinions. The Supreme Court majority opinion concluded that Thomas' reasons for quitting were personal and subjective, not objectively related to the employment; that there was no evidence to show that he was under pressure to quit, and that he was not required to violate a cardinal tenet of his religion. Therefore, the Court held that the denial of unemployment compensation to Thomas did not violate his right to the free exercise of his religion. A Petition for Rehearing was denied on September 20, 1979.

Eddie C. Thomas now timely files this Petition for a Writ of Certiorari and prays that a writ issue on the following grounds:

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that his petition should be granted because the Supreme Court of Indiana "has decided a federal question of substance in a way in conflict with applicable decisions of this court." Rule 19(1)(b), Rules of the Supreme Court. In upholding the denial of unemployment benefits to the petitioner, who terminated his employment because of his religious convictions, the Indiana Court clearly departed from the holding in *Sherbert* v. *Verner,* 374 U.S. 398, 83 S.Ct. 1790 (1963), which controls this case.

In *Sherbert,* a Seventh Day Adventist was discharged by her employer for refusing to work on Saturdays, her Sabbath. When she was unable to find employment because of her religious objections against Saturday work, she filed a claim for unemployment benefits. The South Carolina Employment Security Commission denied her claim on the basis that she failed, without good cause, to accept otherwise suitable work. The state Supreme Court affirmed that decision and Mrs. Sherbert appealed to the United States Supreme Court, contending that the disqualification abridged her First Amendment right to the free exercise of religion.

In *Sherbert* this Court stated:

> "Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any inciden-

> tal burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . .' *NAACP* v. *Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 341, 9 L.Ed. 2d 405." *Id.*, 83 S.Ct. at 1793."

A majority of the Court was of the view that her disqualification imposed a burden on the free exericse of her religion:

> "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* 83 S.Ct. at 1794.

Because the State offered no persuasive "compelling interest" to justify this infringement, the Court held that for constitutional reasons the state was required to exempt her from its Monday through Saturday availability requirement.

Relying on this analysis, this Court recently held unconstitutional a Tennessee statutory provision disqualifying ministers as candidates for delegates to the State Constitutional Convention because it violated appellant's First and Fourteenth Amendment rights. *McDaniel* v. *Paty*, 98 S.Ct. 1322 (1978). Chief Justice Burger delivered the opinion of the majority holding the following:

> "Yet under the clergy disqualification provisions, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is "punishing a religious profession with the privation of a civil right." 5 The Writings of James Madison 288 (G. Hunt ed. 1904). In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion "[T]o condition the availability of benefits (including access to the ballot) upon this appellant's willingness to violate a cardinal principle of (his) religious faith (by surrendering his religiously impelled ministery) effectively penalizes the free exercise of (his) constitutional liberties." *Sherbert* v. *Verner*, 374 U.S. 398, 406 83 S.Ct. 1790, 1795, 10 L.Ed. 2d 965 (1963)."

As in *Sherbert,* supra, the Court found no compelling state interest to justify an infringement on McDaniel's First Amendment rights.

The decision of the Supreme Court of Indiana is in direct conflict with *Sherbert* and *McDaniel* and must be reversed. The decision reached in Thomas' case, which presented the same federal question involved in *Sherbert* and *McDaniel* must not stand because it erroneously decides an issue already decided by this Court.

Petitioner's case presents a situation strikingly similar to *Sherbert.* After a year of satisfactory work in the Roll Foundry, for which department he was specially hired, he was transferred to another division where the job assigned to him was in direct and serious conflict with his religious beliefs as a Jehovah's Witness. In *Sherbert,* the petitioner's religious convictions prevented her from working on Saturday; in the instant case the petitioner's religious beliefs prohibit work with armaments or items

used in the advancement of war. As in *Sherbert,* and *McDaniel,* petitioner herein is forced to make a choice, which has been held constitutionally impermissible because it unduly burdens petitioner's right to free exercise. *Sherbert,* supra, at 1794.

Petitioner Thomas was faced with that unconstitutional choice. The referee of the Indiana Employment Security Division concluded that *"he did quit for religious reasons."* (App. 3a) The Review Board also determined that Thomas voluntarily *"left his employment because his religious beliefs would not allow him to continue to work producing arms, after being transferred from his original department which was not engaged in the manufacture of items used in the advancement of war."* (Emphasis supplied, App. 5a).

Since the trier of facts concluded that petitioner Thomas lost his employment because of his religious beliefs, *Sherbert* and *McDaniel* require reversal of the decision of the Supreme Court of Indiana. In his dissenting opinion, Justice Hunter noted the following:

> "An inquiry by this Court into whether Thomas' convictions are religious would be improper in this case. As stated above, the facts as found by the referee, and as adopted by the Review Board, indicate that Thomas did indeed quit his job due to his religious convictions. Furthermore, this Court should not pick apart a religious adherent's beliefs because he is struggling" with his position or because his beliefs are not eloquently stated. Neither should we distinguish between literal and interpretative readings of religious scriptures nor distinguish among so called cardinal tenets" of various religions." (App. 42a)

and

> "We are dealing here with a person's action pursuant to his religious beliefs, and cannot properly tell a litigant that he has misinterpreted his own beliefs." (App. 43a).

Under the circumstances, the application of Indiana Code 22-4-15-1 (Burns Code Ed. 1974) to the petitioner infringes upon his First Amendment rights. Once such conclusion is reached, benefits must be awarded unless the abridgment of the First Amendment rights is justified by a compelling state interest. In its oral argument before the Indiana Court of Appeals, the Review Board conceded that in the event the Court found a burden on Thomas' First Amended rights, no "compelling state interest" could be offered in justification. (App. 19a).

This analysis was the basis for the decision rendered by the U.S. District Court for the Western District of Kentucky in *Lincoln* v. *True,* 408 F.Supp. 22, 1975, where a Jehovah's Witness quit her employment with a tobacco products manufacturer for religious reasons and was denied unemployment benefits for quitting without good cause. Following the *Sherbert* decision, the Kentucky Court determined that the denial of benefits where termination of work was the result of religious beliefs constituted a violation of her First Amendment rights.

In the instant case, as in *Sherbert, McDaniel* and *Lincoln,* the state has advanced no compelling interest to justify its infringement on constitutional rights of the highest order. Even in the event they had a compelling state interest, the teachings of *Sherbert* and *Wisconsin* v. *Yoder,* 406 U.S. 205, 92 S.Ct. 1526 (1972) are that the state's goals must be analyzed in terms of the burden

imposed upon petitioner's free exercise right. Absent a compelling state interest, we must conclude that the burden placed on Thomas' constitutional rights is impermissible.

Because the federal question presented is of the utmost importance, and the Indiana Supreme Court has decided it in a way directly in conflict with decisions of this Court, petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Indiana Supreme Court.

Respectfully submitted,

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APPENDIX A

INDIANA EMPLOYMENT SECURITY DIVISION
Appellate Section
10 North Senate Avenue
Indianapolis, Indiana 46204

DECISION OF APPEALS REFEREE

In the Matter of:

CLAIMANT:
EDDIE C. THOMAS
744 Caroline Street
Gary, Indiana 46402

EMPLOYER:
BLAW-KNOX
4407 Railroad Avenue
East Chicago, Indiana

Claim No. 2/5 10-0
Rec'd 12-15-75
Soc. Sec. No. 311-40-9393
Deputys Determination 12-11-75
Hearing Date 1-27-76
Referee Marlowe
Case No. 75-A-12221
Date Claim Filed 11-6-75
Appeal Filed 12-11-75
Decision Mailed Mar. 3, 1976
Reporter Cassette

NOTE: The following decision is final unless the claimant, or the employer involved, if any, appeals therefrom to the Review Board in the manner and form provided by law and repulation within 15 days after the mailing date hereof.

Statutory Provisions Involved: Indiana Code 1971, Title 22, Article 4, Chapter 15-1 of the Indiana Employment Security Act. (See attached page.)

Summary of Case: The claimant was heard on appeal from a deputy's initial determination of eligibility, dated December 11, 1975, which determination held that on or about November 6, 1975, claimant voluntarily left his employment without good cause in connection with the work; therefore, the statutory penalty as set forth in Chapter 15, Section 1 of the Indiana Employment Security Act as imposed. Claimant appeared in person at the hearing held in Gary, Indiana, on January 27, 1976. The employer, although duly notified of time and place hearing would be held, did fail to appear.

Findings and Conclusions: The claimant worked for this employer for approximately one year concluding his employment on November 6, 1975. The claimant worked for this employer as a chairman "hooker" and received approximately $4.52 per hour as remuneration for his services. The uncontradicted evidence indicates the claimant did voluntarily leave his position after requesting a layoff from the company. The evidence reveals that the claimant on his initial application form for employment indicated a religious belief of Jehovah Witness, and indicated his hobbies to be bible studying and bible reading. Claimant, upon the recommentation of another Jehovah Witness, was hired especially into the "Roll Foundry" where claiman performed as a satisfactory employee. The evidence reveals that approximate two to three weeks prior to the claimant's date of leaving, the "Roll Foundry" was closed permanently and claimant was transferred to the terret line. Claimant, at this time, real realized that all of the other functions at The Blaw-Knox company were engaged in producing arms for the Armanent Industry. Claimant's religious beliefs specifically exempts claimant from producing or aiding in the manufacture of items used in the advancement of war. Claimant continually searched for a transfer to another department which would not be so armament related; however, this

did not materialize, and prior to the date of his leaving, claimant requested a layoff, which was denied; and on November 6, 1975, *claimant did quit due to his religious convictions.* The evidence further reveals that the other Jehova Witness, who claimant used as a reference to gain his job, continued to work for the Blaw-Knox company in spite of his armament producing capability, and found a less strict interpretation of the Jehovah Witness principles, which claimant could not morally accept. The referee notes the *claimant did not knowing his special circumstances, seek out information concerning the Blaw-Knox company and its armament producing functions prior to his employment.* From the foregoing findings it is concluded that the claimant did voluntarily leave his position on November 6, 1975. *It is further concluded by the referee that the claimant has the burden of going forward and establishing good cause in connection with the work, and that claimant has not done so in this case.* It is the conclusion of the referee that it was the *claimant who placed special restrictions on his working capabilities, and that it was also the claimant who sought out the job at Blaw-Knox,* not the employer who sought out the claimant; therefore, the employer hired the claimant in spite of his special circumstances. *The action of the company leaves the referee with the conclusion that the claimant wanted to work for this employer when the claimant knew of his special circumstances and yet, in light of that, still requested employment whereupon the employer did grant set employment.* Therefore, *the referee findings no logic to the proposition that the employer in anyway contributed to the claimant's voluntarily leaving thereby establishing good cause in connection with the work.* Therefore, the referee concludes, the claimant did voluntarily leave his employment without good cause in connection with the work.

Decision: The determination of the deputy is affirmed. Statutory penalty is imposed.

Dated this 24th day of February, 1976.

Charles F. Marlowe, Referee

dc

INDIANA EMPLOYMENT SECURITY DIVISION
10 North Senate Avenue
Indianapolis, Indiana 56204

DECISION OF REVIEW BOARD

In the Matter of:

CLAIMANT:
Eddie C. Thomas
744 Carolina Street
Gary, Indiana 46402

EMPLOYER:
Blaw-Knox Foundry & Machinery, Inc.
4407 Railroad Avenue
East Chicago, Indiana 46314

Case No. 76-R-468

Claim No. 2/5 10-0

Soc. sec. No. 311-40-9393

Hearing Date 11-9-76

Date of Appeal 3-5-76

Transcript Reveived 4-26-76

Decision Mailed 11-30-76

Note: This decision shall be final unless the claimant or employer files notice of intention to appeal to the Indiana Court of Appeals within fifteen (15 days after the mailing date hereof. (Indiana Employment Security Act, Chap. 17, Sec. 11 [IC 1971, 22-4-17-11] et seq., Burns 1959 Supp., Sec. 52-1542j.)

Statutory Provision Involved: Indiana Employment Security Act (hereinafter referred to as the Act), IC 1971, 22-4-15-1.

Case History - Source of Appeal: The claimant appealed to the Review Board from the referee decision mailed March 3, 1976, which affirmed the deputy's initial determination of December 11, 1975, holding that claimant quit voluntarily without good cause in connection with work; that his benefit rights were suspended effective

week ending November 8, 1975, until he has arned $92 or more in each of ten weeks; and that his maximum benefit amount was reduced by 25% or $264. Both parties hereto requested a review of the record in lieu of appearance at the Review Board hearing on November 9, 1976.

The point in dispute before the Review Board is whether claimant left his employment voluntarily without good cause in connection with work within the meaning of Chapter 15-1 of the Act.

Statement of Facts: The evidence of record indicates that claimant worked for this employer approximately one year prior to November 6, 1975, his last workday, as a chainman "hooker" at a final hourly pay rate of $4.52; and that he left his employment voluntarily because his religious beliefs as a Jehovah Witness would not allow him to continue to work producing arms, after being transferred from his original department which was not engaged in the manufacture of items used in the advancement of war.

Findings and Conclusions: The Review Board now adopts, by reference, the findings and conclusions of the referee in Case No. 75-A-12221 in the decision mailed March 3, 1976.

Decision: The decision of the referee in Case No. 75-A-12221 is hereby affirmed this 29 day of November, 1976.

Review Board
/s/ William H. Skinner, Chairman
/s/ J. Frank Hanley II, Member
/s/ Ralph F. Miles, Memeber

STATE OF INDIANA
217 State House
Indianapolis 46204

No. 2-1276A491

Eddie C. Thomas v. Review Board of the Indiana Employment Security Division and Blaw-Knox Foundry & Machinery Inc.

You are hereby notified that the Indiana Court of Appeals has on this day issued the closed Opinion.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

Witness my name and the seal of said Court, this 26th day of October, 1978.

/s/ Billie R. McCullough
Clerk Supreme Court and Court of Appeals

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In The

COURT OF APPEALS OF INDIANA
Second District

EDDIE C. THOMAS,

Appellant,

vs.

REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, WILLIAM H. SKINNER, J. FRANK HALEY, and RALPH MILES, as Members and as constituting the Review Board of Indiana Employment Security Division,

and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Appellees.

No. 2-1276 A 491

Appeal from the Decision of the Review Board of the Indiana Employment Security Division

SULLIVAN, J.

Eddie C. Thomas appeals from a decision of the Employment Security Review Board (the Board) denying his claim for unemployment compensation. The relevant facts are not in dispute and disclose that Thomas voluntarily terminated his employment for religious reasons. Thus, the reason for termination is not in dispute and is inextricably tied to First Amendment considerations.

In affirming the referee's decision, the Board adopted "by reference" the referee's Findings and Conclusions as follows:

> "Findings and Conclusions: The claimant worked for this employer for approximately one year concluding his employment on November 6, 1975. The claimant worked for this employer as a chainman 'hooker' and received approximately $4.52 per hour as remuneration for his services. The uncontradicted evidence indicates the claimant did voluntarily leave

his position after requesting a layoff from the company. The evidence reveals that the claimant on his initial application form for employment indicated a religious belief of Jehovah Witness, and indicated his hobbies to be bible studying and bible reading. Claimant, upon the recommendation of another Jehovah Witness, was hired especially into the 'Roll Foundry' where claimant performed as a satisfactory employee. The evidence reveals that approximately two to three weeks prior to the claimant's date of leaving, the 'Roll Foundry' was closed permanently and claimant was transferred to the terret [sic] line. Claimant, at this time, realized that all of the other functions at The Blaw-Knox company were engaged in producing arms for the Armanent Industry. Claimant's religious beliefs specifically exempts [sic[claimant from producing or aiding in the manufacture of items used in the advancement of war. Claimant continually searched for a transfer to another department which would not be so armament related; however, this did not materialize, and prior to the date of his leaving, claimant requested a layoff, which was denied; and on November 6, 1975, *claimant did quit due to his religious convictions.* The evidence further reveals that the other Jehovah Witness, who claimant used as a reference to gain his job, continued to work for the Blaw-Knox company in spite of his armament producing capability, and found a less strict interpretation of the Jehovah Witness principles, which claimant could not morally accept. The referee notes the claimant did not, knowing his special circumstances, seek out information concerning the Blaw-Knox company and and its armament producing functions prior to hi employment."

"From the foregoing findings it is concluded that the claimant did voluntary leave his position on November 6, 1975. It is further concluded by the referee that the claimant has the burden of going for-

ward and establishing good cause in connection with the work, and that the claimant has not done so in this case. It is the conclusion of the referee that it was the claimant who placed special restrictions on his working capabilities, and that it was also the claimant who sought out the job at Blaw-Knox, not the employer who sought out the claimant; therefore, the employer hired the claimant in spite of his special circumstances. The action of the company leaves the referee with the conclusion that the claimant wanted to work for this employer when the claimant knew of his special circumstances and yet, in light of that, still requested employment whereupon the employer did grant set employment. Therefore, the referee finds no logic to the proposition that the employer in anyway contributed to the claimant's voluntarily leaving thereby establishing good cause in connection with the work. Therefore, the referee concludes, the claimant did voluntarily leave his employment without good cause in connection with the work." (Emphasis supplied).

We are squarely presented with the question whether the disqualifying provision of the Indiana Statute, I.C. 22-4-15-1 (Burns Code Ed. 1974),[1] violates Thomas' First Amendment guarantee to the free exercise of his religion.[2]

Thomas places principal reliance on *Sherbert* v. *Verner* (1963) 374 U.S. 398, 83 S.Ct. 1790 and *Lincoln* v. *True* (W.D. Ky. 1975) 408 F.Supp. 22 to support his claim for benefits.

---

[1] "[A]n individual shall be ineligible for [benefits] if it is determined that he voluntarily left his employment without good cause in connection with the work . . . "

[2] The Religion Clauses of the First Amendment are applicable to the states through the due process clause of the Fourteenth Amendment. *Cantwell* v. *Connecticut* (1940) 310 U.S. 296, 60 S.Ct. 900.

In *Sherbert,* a Seventh Day Adventist, unable to find employment because of her conscientious scruples against Saturday work, filed a claim for unemployment benefits. The South Carolina Employment Security Commission denied her claim on the basis that she failed, without good cause, to accept otherwise suitable work. The state Supreme Court affirmed that decision and Sherbert appealed to the United States Supreme Court, contending that the disqualification abridged her First Amendment right to the exercise of religion.

The Supreme Court analyzed Sherbert's claim in the following context:

> "Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of oppellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . .' *NAACP* v. *Button,* 371 U.S. 415, 438, 83 S.Ct. 328, 341, 9 L.Ed.2d 405." *Id.,* 83 S.Ct. at 1793.

A majority of the Court was of the view that her disqualification imposed a burden on the free exercise of her religion:

> "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of

> her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.*, 83 S.Ct. at 1794.

Because the State offered no persuasive "compelling interest" to justify this infringement, the Court held that for constitutional reasons the state was required to exempt her from its Monday through Saturday availability requirement.[3]

The *Lincoln* case, *supra,* applied the *Sherbert* holding in a slightly different context—a context identical to that before us. In *Lincoln,* the claimant voluntarily terminated her employment with a tobacco company "because elders of Jehovah's Witnesses, a . . . sect of which she had been a member for 15 years, informed her that anyone using tobacco or working with tobacco products was violating the Will of God, and unless she resigned, she would be expelled from the fellowship of Jehovah's Witnesses." *Id.* at 22. The Kentucky Unemployment Insurance Commission denied her claim to benefits, calling her action a vountary quitting without good cause. The District Court cited *Sherbert* as controlling and held that the denial of benefits was in violation of the claimant's First Amendment right to the free exercise of her religion and ordered that benefits be paid.

The Board here contends that neither *Sherbert* nor *Lincoln* control disposition of the present appeal.

The Board did not address *Lincoln* in its brief, but during oral argument observed that *Lincoln* had misstated

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[3] In so doing, the Court rejected the offered justification that fraudulent claims by persons feigning religious objections would dilute the unemployment compensation fund and that the administrative inconvenience resulting from an exemption would render the entire statutory scheme unworkable. *Sherbert, supra,* 83 S.Ct. at 1795-1797.

the holding of *Sherbert,* on which it relied. It is true that *Lincoln* erroneously described Sherbert as having been discharged instead of having been "unavailable for work." Accordingly, this distinguishing factor will be hereinafter discussed but its consequence is significant only to the extent that we do not have available a reasoned analysis of the distinction between cases involving "voluntary quit" as opposed to "availability for work" or "discharge."

The Board contends that the distinction between disqualification standards under each statutory provision—between good cause for quitting, I.C. 22-4-15-1, *supra,* and good cause for refusing work, IC. 22-4-15-2 (Burns Code Ed. 1974)—makes *Sherbert* distinguishable. We agree that the distinction exists and that the standards for entitlement to benefits in a "voluntary quit" case are more strict than those in a "work availability' case. See *Gray* v. *Dobbs House, Inc.* (2d Dist. 1976) Ind.App., 357 N.E.2d 900. However, no explanation is offered by the Board why this should preclude application of the *Sherbert* analysis to Thomas' claim. Indeed, the Board argues merely that there *is* a distinction and that Thomas' disqualification "was simply a determination that objective, religiously neutral standards were not met."

We think it settled that

> "[e]ven as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications closing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." *Gillette* v. *United States* (1971) 401 U.S. 437, 91 S.Ct. 828, 842.

Thomas is challenging the "neutral" disqualifying provisions *as they apply to him.* If the denial of benefits does not "burden" his free exercise rights, compensation may properly be denied. *Cf. Sherbert.* But if we discern an infringement of such rights, unemployment compensa-

tion must be awarded unless the abridgment is justified by a "compelling state interest." We find no basis in *Gray, supra,* which precludes such result.

Our task in applying the *Sherbert* standards to Thomas' claim has been focused by the Board's concession at oral argument that should we find a "burden" on Thomas' free exercise rights, no "compelling state interest" can be offered in justification.

We must therefore examine the question "whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion." *Sherbert, supra,* 83 S.Ct. at 1794. Though not as "clear" a case as *Sherbert,* we think that it does impose such burden.

In *Sherbert,* the claimant was forced to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, or abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* So, too, Thomas was here confronted with a similarly burdensome choice—either following the precepts of his religion and thereby forfeiting unemployment benefits, or abandoning the precepts of his religion in order to maintain his employment and thereby avoid the adverse economic consequence of benefit denial.

We concede that the burden imposed on Thomas' free exercise rights is less direct than that found in *Sherbert.* Nevertheless, "[i]f the . . . effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown* (1961) 366 U.S. 599, 81 S.Ct. 1144, 1148.

Sherbert noted that the decision therein did not establish "the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment." *Id.,* 83 S.Ct. at 1797. Certainly Sherbert's conduct could

be said to have been the "cause" of her unemployment. Indeed, the Court stated that Sherbert's ineligibility "derive[d] solely" from her religious convictions. *Id.*, 83 S.Ct. at 1794. Thus, we view Justice Brennan's statements in the majority opinion as a limitation of the *Sherbert* holding, excluding from its ambit one who feigns religious objections to employment or who may be merely a malingerer seeking sanctuary and economic benefit within the protections of the Frst Amendment.[4]

It is also true that Thomas' religious beliefs were found by the Board to be the "cause" of his unemployment. Yet like Sherbert, his conduct is not "of a kind within the reach of state legislation." *Id.*, 83 S.Ct. at 1793. Indeed, the Court in *Sherbert* noted that though "certain overt acts" prompted by religious beliefs or principles are not totally free from legislative restrictions, "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace of order." *Id.* As in *Sherbert,* we discern no such threat as a result of Thomas' conduct.

The purpose of the Indiana Employment Security Act is to provide benefits "to persons unemployed through no fault of their own." I.C. 22-4-1-1 (Burns Code Ed. 1974). Only in the most tortured sense may Thomas' unemployment be called his own "fault," for Thomas' only "fault" was belief in basic tenets of the Jehovah's Witnesses religion.

Thomas was specially hired into the roll foundry, to help produce non-military goods. When he was trans-

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[4] This is not to say that th ecourts may subjectively inquire into the validity or rationality of the particular religious tenet or belief, as distinguished from an inquiry into the sincerity of the individual in espousing or seeking refuge in a particular "religious" belief or conviction. See *United States* v. *Ballard* (1944) 322 U.S. 78, 64 S.Ct. 882. See also, *Sherbert, supra,* 83 S.Ct. at 1795.

ferred to the turret line and became aware of the nature of his new work, he made every effort to find different work consistent with his religious beliefs. When he found that besides the now-defunct roll foundry, Blaw-Knox produced *only* military armaments, he requested a lay-off and asked to be re-hired should the foundry re-open. This request was denied and therefore Thomas felt compelled, according to his religious beliefs, to terminate his employment. Under these facts, he had no reason to investigate the products manufactured by the departments of Blaw-Knox other than the roll foundry. We intimate no view whether in a different case, under different factual circumstances, an employee may be obligated to make inquiry concerning the nature of some or all of the prospective or possible employment duties.

The Board contends that granting benefits under the circumstances at bar would constitute a violation of the Establishment Clause. This contention is not supported by citation of authority or by argument. See Ind. Rules of Procedure, Appellate Rule 8.3(A)(7). Nor does the Board attempt to distinguish or otherwise dilute the holding of *Sherbert,* which rejected a similar argument out-of-hand and without rationale or supportive reasoning:

> "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. See *School District of Abington Township* v. *Schempp,* 374 U.S. 203, 83 S.Ct. 1560." *Id.*, 83 S.Ct. at 1797.

Sherbert's treatment of this issue has not escaped criticism.[5] Indeed, it has been pointed out that the Court had failed "to face up to the dilemma posed by the conflict between the Free Excercise Clause . . . and the Establishment Clause . . ." Id., 83 S.Ct. at 1800 (Stewart, J., concurring in result).

Admittedly, the *Sherbert* decision in this respect, has some arguable increased precedential effect by having survived the fifteen years of its existence without specific judicial encroachment. We, nevertheless, feel compelled, in judicial conscience, to acknowledge the "dilemma" and to state our view of the present posture of the law in this regard.

Inviolability of conscience lies at the heart of the Free Exercise Clause,[6] while the Establishment Clause was bottomed on the notion that the federal government should be disabled from lending its power to that of the church.[7]

However, as government has broadened its scope of regulatory action, it has tended "to make majority notions into normative standards; enjoyment of benefits and sometimes avoidance of penalties are conditional upon accept

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[5] See Weiss, "Privilege, Posture and Protection: 'Religion' in the Law," 73 Yale L.J. 593, 620-623 (1964).

[6] Gianella, "Religious Liberty, Nonestablishment and Doctrinal Development. Part I: The Religious Liberty Guarantee," 80 Har. L. Rev. 1381, 1386 (1967). Indeed, "[t]he violation of a man's religion or conscience often works an exceptional harm to him which, unless justified by the most stringent social needs, constitutes a moral wrong in and of itself, far more than would the impairment of his freedoms of speech, press or assembly." Clark, "Guidelines for the Free Exercise Clause," 83 Har.L.Rev. 327, 337 (1969).

[7] Gianella, "Religious Liberty, Nonestablishment and Doctrinal Development. Part II: The Nonestablishment Principle," 81 HarL.Rev. 513, 514 (1968).

ance of [such] prevailing notions . . ."[8] Though "[t]he majority standards thus 'established' are not in common estimation religious[,] . . . for some minorities they collide painfully with religious commands and prohibitions."[9] Because the State has entered the positive realm of allocating resources and "actively structuring the social order," the question of how different religious groups and interests should be treated is fundamentally different than that viewed from the perspective of the Framers.[10]

Indeed, the Framers probably did not appreciate the inner tension between the two clauses[11] which has developed into a struggle "to find a neutral course between the two Religion clauses, both of which are cast in absolute terms, and either of which if expanded to a logical extreme, would tend to clash with the other." *Walz* v. *Tax Commission of City of New York* (1970) 307 U.S. 664, 90 S.Ct. 1409, 1411. The need to accomodate the two clauses prompted the Supreme Court to state in the *Walz* case:

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we wil not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference." *Id.*, 90 S.Ct. at 1411-1412. (Emphasis supplied).

The "strict neutrality" or "religion-blind" approach to the problem has been rejected. Instead the Court has apparently preferred to recognize that

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[8] Galanter, "Religious Freedoms in the United States: A Turning Point?" 1966 Wis.L.Rev. 217, 268 (1966).

[9] *Id.*

[10] Gianella, Note 7, *supra,* p. 515.

[11] Gianella, Note 6, *supra,* p. 1389.

". . . government's actions impinge on different persons in dramatically different ways, so that truly evenhanded treatment at times compels exempting those whose religious beliefs are exceptionally burdened by a challenged state action. In this *zone of required accommodation,* the theory is that only an illusory and hostile neutrality would be achieved by pursuing a religion-blind constitutional ideal."[12]

Sherbert makes clear that "benevolent neutrality" may at times require government to take affirmative steps to remove barriers to the free exercise of religion[13] by making "special provision for religious interests in order to relieve them from both direct and indirect burdens placed on the free exercise of religion by increased governmental regulation."[14] The dominance of the Free Exercise Clause has thus been explained as "the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment."[15]

At least one commentator has suggested that *Sherbert* is an "aberration" and should not be followed.[16] This conclusion is premised upon the Supreme Court's holdings in *United States* v. *Seeger* (1965) 380 U.S. 163, 85 S.Ct. 850 and *Welsh* v. *United States* (1970) 398 U.S. 333, 90 S.Ct. 1792. These cases dealt with the selective service law's conscientious objector provisions. The statutory exemption was limited to those persons whose status arose from "religious training and belief," which the statute defined in terms of the objector's relation to a "Supreme Being." The Court held that the exemption encompassed

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[12] Tribe, *American Constitutional Law,* §14-4, p. 821 (1978). (Emphasis in original).

[13] Comment, 10 Vill.L.Rev. 337, 341 (1965).

[14] Gianella, Note 7, *supra,* p. 518.

[15] Tribe, Note 12, *supra,* §14-7, p. 833.

[16] Ely, "Legislative and Administrative Motivation in Constitutional Law," 79 Yale L.J. 1207 (1970).

all those whose refusal to serve was based on a sincerely held moral objection. "A construction this strained," it is said, "is defensible only as a response to, and obviously was the product of, a desire to preserve the statute's constitutionality; . . . the court . . . was telling Congress that an exemption limited to religious objectors would probably violate the Establishment Clause. *A fortiori,* such an exemption should not be judicially compelled."[17] Therefore, it is argued that "[w]hatever authority *Sherbert* ever possessed has been drained by [the] *Welsh* [and *Seeger*] opinion[s]."[18]

It is readily observable that United States Supreme Court opoions dealing with the two Religion Clauses are very difficult to harmonize. However, the *Welsh* and *Seeger* opinions could themselves be seen as "aberrations," for they were written at the height of the Vietnam conflict. In any event, *Sherbert* has not been modified or overruled and remains a viable precedent to this day. Thus, *Seeger* and *Welsh* to the contrary notwithstanding, *Sherbert* must control the case before us. If the law is to be changed, it must be done by the United States Supreme Court. Our task is merely to apply the law as announced by that Court to the facts of cases involving federal constitutional questions.

Under the authority of *Sherbert,* we are compelled to hold that the disqualifying provision of I.C. 22-4-15-1 (Burns Code Ed. 1974), as it applied to Thomas, casts an impermissible burden on his First Amendment guarantee to the free exercise of his religion. Because the Board has conceded that no "compelling state interest" exists to justify such a burden, we must hold that the statute is unconstitutional as applied to Thomas.

The judgment is reversed and the cause remanded with directions that the Board enter an award not inconsistent with this opinion.

SHIELDS, J., Concurs
BUCHANAN, C.J., Dissents With Opinion.

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[17] *Id.,* p. 1320.
[18] *Id.,* p. 1322.

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In The
COURT OF APPEALS OF INDIANA
Second District

EDDIE C. THOMAS,

Appellant,

vs.

REVIEW BOARD OF THE THE INDIANA EMPLOYMENT SECURITY DIVISION, WILLIAM H. SKINNER, J. FRANK HALEY, and RALPH MILES, as Members and as constituting the Review Board of Indiana Employment Security Division,

and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Appellees.

No. 2-1276-A-491

Appeal from the Decision of the Review Board of the Indiana Employment Security Division

BUCHANAN, C.J.

DISSENT

I must respectfully dissent.

My examination of the facts indicates to me that Eddie Thomas ((Thomas) sought and received employment at Blaw-Knox Foundry and Machinery, Inc. (Blaw-Knox) . . . a plant primarity engaged in producing weapons, which was an activity strictly forbidden by Thomas's religion.[1]

It is a finespun distinction indeed for a person with Thomas's religious convictions to justify working in a war plant because he was only involved with non-military goods. The Board found that "the claimant did not, knowing his special circumstances, seek out information concerning the Blaw-Knox company and its armament producing functions prior to his employment." The unmistakable inference is that he either knew or should have known[2] he was compromising his religious beliefs at the time he entered employment of this nature, and in my opinion, has waived his right to deny that his unemployment is due to personal reasons and not good cause.[3]

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[1] Although the Review Board found the "roll foundry"

[2] A worker might be able to fulfill his duty by *clearly* indicating possible religious prohibitions when applying for a job. However, merely indicating the denomination of his church does not fulfill that obligation.

[3] It might also be argued that Thomas was estopped from asserting his claim because he misled Blaw-Knox regarding his status as an employee. The elements of equitable estoppel as defined by *Emmco Insurance* v.

And I interpret *Sherbert* v. *Verner* (1963), 374 U.S. 398, 83 S.Ct. 1790, relied on by the majority, to be consistent with this position.

Sherbert involved a Seventh Day Adventist whose employer switched to a six-day work week two years *after* she began work. Because this required work on Saturday, a practice forbidden by her religion, she was discharged. She was unable to find other work (due to her Saturday work restriction) and finally filed for unemployment benefits. That application was denied because of her refusal to accept other suitable work, a denial which the United States Supreme Court held to violate her First Amendment rights regarding the free exercise of religion.

The *Sherbert* decision, which specifically limited itself to its facts,[4] has been severely criticized.[5] At the

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[3] (Continued)
Pashas (1967), 140 Ind. App. 544, 224 N.E.2d 314, are as follows:

(1) A representation or concealment of material facts; (2) The representation must have made with knowledge of the facts [or with inexcusable negligence in finding the facts, *Seymour Improvement Co.* v. *Viking Sprinkler Co.* (1928), 87 Ind.App. 179, 161 N.E. 389]; (3) The party to whom it was made must have been ignorant of the matter; (4) It must have been made with the intention that the other party should act upon it; (5) The other party must have been induced to act upon it.

Additionally, an intent to deceive is not a requisite to allowing estoppel, but merely that the misled party was expected to rely upon the representations. *Strafford* v. *Lane* (1890), 124 Ind. 592, 24 N.E. 683.

[4] "Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions regarding the day of rest." 374 U.S. at 410, 83 S.Ct. at 1797.

[5] *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

time Sherbert accepted employment, her job did not contravene her religious beliefs. Only later, because of an unforeseeable change in work week by the company did a conflict arise. Thus, unlike Thomas, she did not voluntarily or carelessly place herself in a position in which she might have to choose between employment and religious principles.[6]

Similarly, the other case relied on by the majority, *Lincoln* v. *True* (1975), 408 F.Supp. 22, involved a worker who, *after* taking acceptable employment, was forced to resign by changed circumstances beyond his control.[7]

Perhaps an even more troubling aspect of the decision in this case is that in safeguarding a claimant's right to "Free Exercise" of religion under the First Amendment, the court comes dangerously close to contravening the Establishment Clause of the same amendment. As Professor Ely wrote, "The course of action thus suggested by the Court—granting exemptions only to religious persons—is extremely suspect under the establishment clause: . . . . My suggestion here, . . . , is that judicial intervention is indicated only when there is proof that the choice (of the legislature) resulted from a dessire comparatively to favor or disfavor a religion generally." 79 YALE L.J.

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[6] *Sherbert* may also be distinguished because it involves a refusal to accept new work (*See* IND. CODE 22-4-15-2) rather than "good cause for quitting," as is in the instant case (*See* IND. CODE 22-4-15-1). The majority recognizes it applied a stricter standard in allowing benefits for the latter situation. *See Gray* v. *Dobbs House, Inc.* (1978), ... Ind.App. ....., 357 N.E.2d 900.

[7] Lincoln had worked for Phillip Morris Corporation for 15 years when the ruling council for his Jehovah's Witness church decided it sinful to work with tobbaco. Faced with a choice between expulsion from his church or loss of employment, Lincoln chose to quit his job. The Kentucky court, relying upon *Sherbert*, decided that unemployment compensation could not be denied upon this basis.

at 1314, 1319. Impact alone, he concluded, should not trigger intervention.

Although the State may have a responsibility to make "special provision for religious interests in order to relieve them from both direct and indirect burdens placed on the free exercise of religion by governmental regulation," *Giannella, Religious Liberty, Nonestablishment and Doctrinal Development. Part II: The Noneestablishment Principle.,* 81 HARVARD L.REV. 513, 518 (1968), that responsibility should not be extended to relieving a burden which is essentially one of the claimant's own making. The Free Exercise clause is not that elastic.

Thus it appears to me that the First Amendment pendulum has been swung by the majority out of its natural arc in the Free Exercise area into an unnatural arc in the Establishment Area, and I would therefore affirm the Board's decision.

STATE OF INDIANA
Indianapolis, 46204

No. 2-1276A491

Eddie C. Thomas v. Review Board et al
You are hereby notified that the Court of Appeal has on this day. Appellee Petition for Rehearing Denied. Buchanan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 22nd day of November, 1978.

/s/ Billie R. McCullough

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Billie R. McCullough
Clerk Supreme Court and Court of Appeals

Andrea K. Knish & Janet JonNusch,
Cary Theo. L. Sendak, Atty. Genl.

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1/22/78

No. 2-1276A491

I hereby acknowledge receipt of the above notice.

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IN THE
SUPREME COURT OF INDIANA

No. 779 S 192

EDDIE C. THOMAS,

Appellant ᴀ*Claimant*ᴏ

vs.

REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, William H. Skinner, J. Frank Haley, and Ralph Miles, as Members and as constituting the Review Board of Indiana Employment Security Division, and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Appellees.

APPEAL FROM THE DECISION OF THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION ON PETITION TO TRANSFER

PIVARNIK, *J.*

This cause comes to us on a petition to transfer from the Court of Appeals. Appellant filed a claim for unemployment compensation stating that he voluntarily quit

work because of religious convictions. After an initial determination by a deputy denying his claim, a hearing was held before an appeals referee on January 27, 1976. His decision of March 3, 1976 affirmed the determination of the deputy and included Findings and Conclusions denying Eddie C. Thomas' claim for unemployment compensation because he voluntarily left his employment without good cause in connection with the work. The Employment Security Review Board affirmed the referee's decision and adopted, by reference, the referee's Findings and Conclusions. The Court of Appeals Opinion by Sullivan, J., Shields, J., concurring, reversed the judgment of the Review Board. Buchanan, C.J., dissented with opinion. *Thomas* v. *Review Board of Indiana Employment Sec.,* (1978) Ind.App., 281 N.E.2d 888.

The question presented for our review is whether the statute which made the claimant ineligible for unemployment benefits if he voluntarily left his employment without good cause in connection with the work, Ind. Code §22-4-15-1 (Burns 1974), as it applies to Thomas, violates his First Amendment guarantee to the free exercise of his religion.

The record reveals that the claimant, Eddie C. Thomas, without seeking any information about the company, applied for employment at Blaw-Knox, a plant engaged primarily in the production of weapons. He was aided in obtaining the employment by his friend, a fellow church member, who worked in the roll foundry. The general foreman of the roll foundry had agreed to hire Thomas, so when he applied he was hired directly into the roll foundry. There was no exception made for him because of his religion. On his employment application he gave his religion as Jehovah's Witnesses and listed as hobbies Bible reading and Bible study. He stated no restrictions or conditions regarding his work on his application for employment.

Thomas had worked for Blaw-Knox for nearly a year when the roll foundry closed. He was then transferred to the turret line. He stated that on the first day he worked there as a chainman hooker, he realized what type of work he was doing, and that after checking the board where job openings were posted, he finally realized that "all of Blax-Knox was armaments." He approached his friend, the other Jehovah's Witness, about the work situation and his friend said that he didn't find anything wrong with working there, and that he didn't view it as "unscriptural." The claimant then inquired of other members of the congregation and stated that they agreed to make the decision of whether or not it would be unscriptural for him to continue working there. The record does not reflect whether or not this decision was made by them. The claimant did not seek a transfer because he said there were no other departments for him to work in. He asked for a lay-off, which was denied, and on November 6, 1975, he quit after working as a chainman for nearly a month, stating that continuing to work with armaments was against his religious principles.

The fact that Eddie Thomas decided that he could not, in good conscience, work at Blaw-Knox and that he quit voluntarily, does not require that this court declare that statute disqualifying him from receiving benefits unconstitutional as it applies to him.

> "To strike down without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."

Braunfeld v. *Braun,* (1961) 366 U.S. 599, 606 81 S.Ct. 1144, 1147 6 L.Ed.2d 563-568.

Under the Indiana Employment Security Act, Ind. Code §22-4-15-1 (Burns 1974) an individual "who has voluntarily left his employment without good cause in connec-

tion with the work" is disqualified from receiving benefits.

The public policy of this State in unemployment compensation is declared in Ind. Code §22-4-1-1 (Burns 1074).

> "Economic insecurity due to unemployment is declared hereby to be a serious menace to the health, morale and welfare of the people of this state and to the maintenance of public order within this state. Protection against this great hazard of our economic life can be provided in some measure by the required and systematic accumulation of funds during periods of employment to provide benefits to the unemployed during periods of unemployment and by encouragement of desirable stable employment. The enactment of this measure to provide for payment of benefits to persons unemployed through no fault of their own, to encourage stabilization in employment, and to provide for a state employment service is, therefore, essential to public welfare; and the same is declared to be a proper exercise of the police powers of the state."

The purpose of this legislation is clear. It is to protect people from the menace of periods of unemployment and to encourage stable employment. It is not intended to facilitate changing employment or to provide relief for those who quit work voluntarily for personal reasons. Voluntary unemployment is not compensable under the purpose of the Act, which is to provide benefits for persons unemployed through no fault of their own. *Abshier* v. *Review Bd., Empl. Sec. Div.,* (1952) 122 Ind. App. 425, 430, 105 N.E.2d 902, cited in *Achenbach* v. *Review Board of Indiana Employment Security Division,* (1962) 242 Ind. 655, 179 N.E.2d 873.

Good cause which justifies voluntary termination must be job-related and objective in character. *In Geckler* v. *Review Bd. of the Ind. Emp. Sec. Div.,* (1963) 244 Ind. 473, 193 N.E.2d 357, the Indiana Supreme Court con-

sidered a claim by an employee who had voluntarily terminated her employment because of criticism by her employer when she "honestly" believed that it was impossible for her to continue in the employment. The question presented was whether such an employee would be considered to have terminated her employment for "good cause." The Court stated:

> "As a general rule, the cases hold that "good cause", which justifies the voluntary termination of employment and entitles the claimant to compensation, must be related to the employment, and thus be *objective* in character. The cases have not extended the construction of "good cause" to include purely personal and subjective reasons which are unique to the employee, but have required that such "cause" would similarly affect persons of *reasonable* and *normal* sensitivity."

Id., 244 Ind. at 477-78, 193 N.E.2d at 359.

In the area of unemployment compensation, Indiana distinguishes between statutory "good cause" for quitting work "with good cause in connection with the work", and some valid personal reason. Neutral objective standards must be met to qualify for compensation.

In *Lewis* v. *Review Board,* (1972) 152 Ind.App. 187, 282 N.E.2d 876, the Court of Appeals determined that a claimant who had left work because of failing eyesight and a desire to be with his children before he became totally blind, had not quit work with "good cause" in connection with the employment within the meaning of the Employment Act. "Good cause" justifying termination of employment and entitling an employee to compensation must objectively relate to the employment and not to reasons personal to the employee.

In *Gray* v. *Dobbs House, Inc.,* (1976) ..... Ind.App. ....., 357 N.E.2d 900, the Court of Appeals discussed the distinction between "good cause" in a failure to apply "without good cause" for available suitable work, or

to accept suitable work offered, and "good cause" involved when an employee *quits* work "without good cause in connection with the work." Parental obligations and transportation difficulties were held not to constitute "good cause" within the meaning of the claim of an employee who had voluntarily left her employment without "good cause" attributable to her employer. This means that a claimant who has terminated his employment must demonstrate that (a) his reasons for abandoning his employment were such as would impel a reasonable, prudent man to terminate under the same or similar circumstances; and (b) these reasons or causes are objectively related to the employment.

In *Gray, supra,* it was noted that although parental obligations no doubt constitute good personal reason for termination of employment, they nevertheless lack the objective nexus with employment envisioned by the Act, which is required for one to qualify for benefits. The claim that transportation was not available without unreasonable expense, and that this fact constituted good cause in connection with the employment, was also rejected by the Court of Appeals, even though it could be good cause for refusing available work under Ind. Code §22-4-15-2 (Burns 1974).

A stricter standard being applied to those who voluntarily quit work as compared to those who refuse available work seems to be in keeping with the intent of the legislature and the announced purpose of the Unemployment Compensation Act to avoid the menace of unemployment by encouraging people to maintain present jobs rather than to quit them. It allows employees to restrict or place necessary conditions upon their acceptance of new work, which would likewise encourage the maintaining of any new employment. This system appears to place responsibility for accommodation of any special considerations where it belongs, on the employee to make known to his prospective employer any special circumstances which will restrict his working. This system also avoids

a detailed speculative inquiry by employers of applicant's personal beliefs, conditions or unique situations prior to hiring and avoids requiring an employer to pay money from his fund for compensation to an employee who voluntarily or carelessly places himself in a position where he will have to choose between quitting work or his personal beliefs. The finding and conclusion that the claimant voluntarily left his employment without good cause in connection with the work is correct. Thomas' reasons for leaving his employment were unique, personal and objective. They were not objectively related to the employment.

> "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. *But if the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance. . . .*"

Braunfeld, supra, 366 U.S. at 607, 81 S.Ct. at 1148, 6 L. Ed.2d at 568.

The disqualifying statute imposes only an indirect burden, if any, on claimant's free exercise of his religion. It makes no religious practice unlawful. The State has enacted a general law, within their power, the purpose and effect of which is to advance the State's secular goals. Such a statute is valid.

Since Thomas is challenging the neutral disqualifying provisions of our statutes as they apply to him, we believe it is necessary to set out his statement of his ideas and beliefs and his objections to his continuing work. "A determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question." A personal philosophical choice rather than a religious choice, does not rise to the level

of a first amendment claim of religious expression. *Wisconsin* v. *Yoder,* (1971) 406 U.S. 205, 215-16, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15, 25.

After the claimant was transferred from the roll foundry to the turret line he did not ask for another transfer. The hearing referee questioned him as follows:

"Q. Okay, because at that point you realized the entire plant was an armaments production.
A. The entire . . .that's correct.
Q. Engaged in armament production. All right.
A. That's correct.
Q. Which is against your religion beliefs, right?
A. That's true.
Q. To contribute to the armament production of the world.
A. That's correct.
Q. Is that correct?
A. That's correct.
Q. All right. Now, at the time you were working at the roll foundry you didn't realize that, right?
A. That . . .
Q. That it was part of an armaments procedure?
A. No, I did not."

This exchange indicates the entire plant, including the roll foundry, was part of an armaments procedure. Nevertheless, the claimant stated that he would have returned to the roll foundry to work. In an attempt to clarify claimant's position the referee asked:

"Q. Mr. Thomas, let me ask you this, getting . . . at the (inaudible) your convictions a little bit. . .
A. Certainly.
Q. What if you were working for United States Steel or Inland Steel who produced steed, the raw product necessary for the production of any kind of a tank. . .
A. Mm-hum.

Q. And you found that that steel was being shipped to whoever . . .
A. Yes, for . . . for . . .
Q. . . . strictly for armaments purpose.
A. Yeah, I understand, strictly for armaments. Then I could continue to . . . to work for U.S. Steel or whatever steel maker or raw products or the . . . whatever producer it might be. I could still scripturally, you know, cause see the work for the . . . for the company . . . because it would . . . it would . . . it would . . . I would not be a direct party to whoever they shipped it to, you see, would not be. . . would not be chargeable in . . . according to my conscience to me, you know. But . . . .
Q. Okay, is it the social atmosphere that makes a tank or is it the people? I don't know. What's the difference whether you work for the steel producer that produces the steel or the coal company that produces the coal or the . . .
A. There . . . there you are.
Q. Or the . . . the company . . . the chemical company that produces the saltpetre.
A. Or the actual . . . or what have you, you know, would . . . the . . . the company that. . . .
Q. You . . . your . . . your expression is then that you . . . finally you have to make a choice.
A. Yeah, you have . . .
Q. And then when it comes to actually producing the tank itself, hammering it out; that you will not do that.
A. That's right, that's right. When I . . . when I'm daily faced with the knowledge that these are tanks . . . that these are tanks and . . . these was a couple other occurrences that really imprinted on my mind exactly where I was working, durin' those three or four weeks that I was working in . . . within armaments. There was what they call it a bomb scare on two different occasions where we had to evacuate the work area. So . . .

Q. Go ahead.
A. I really could not, you know, conscientiously continue to to work with armaments. It would be against all of the . . . the . . . religious principles that . . . that I have come to learn and appreciate except up to that . . . up to this point."

The hearing referee concluded that the claimant, Eddie C. Thomas had left work for religious reasons.

The Review Board accepted this conclusion when it adopted the referee's Findings and Conclusions which are set out in the Court of Appeals opinion. The Court of Appeals, under the authority of *Sherbert* v. *Verner,* (1963) 473 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 held the disqualifying statute, Ind. Code §22-4-15-1 (Burns 1974) to be unconstitutional as casting an impermissible burden upon Thomas' First Amendment guarantee to the free exercise of his religion. We disagree, grant transfer and affirm the Review Board's denial of unemployment benefits to the claimant.

Initially, we observe that there are significant differences between Thomas' situation and that involved in *Sherbert, supra.* In *Sherbert,* a Seventh Day Adventist was disqualified from receiving unemployment compensation when her refusal to work Saturdays, her Sabbath, caused employers to refuse to hire her and resulted in her being disallowed benefits because of her failure to accept suitable employment. The United States Supreme Court emphasized the general discriminatory effect of such a disqualification on Sabbatarians as compared to Sunday worshippers for whom it was provided that no employee would jeopardize seniority nor be discriminated against in any manner for refusal to work on Sunday.

The Court, in *Sherbert,* was careful to state that they did not declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment, and specifically limited their holding as follows:

"Our holding today is only that South Carolina may not constitutionally apply the eligibility provi-

> sions so as to constrain a worker to abandon his religious convictions respecting a day of rest.

Id., 374 U.S. at 410, 83 S.Ct. at 1797, 10 L.Ed.3rd at 974. The Court determined that a burden was placed on the free exercise of Sherbert's religion when her ineligibility for benefits derived "solely from the practice of her religion" and that the "pressure upon her to forego that practice was unmistakable" by forcing her to choose between following the precepts of her religion, remaining unemployed and forfeiting benefits or abandoning one of the precepts of her religion in order to accept work. This clear-cut choice of working on one's Sabbath or being unable to work at all was presented and the court found it to be an unconstitutional burden upon Sherbert's right to the free exercise of her religion.

In *Lincoln* v. *True,* (W.D. Ky. 1975) 408 F.Supp. 22, also relied upon by Thomas, the claimant voluntarily terminated her employment of 21 years with a tobacco company because the elders of the Jehovah's Witnesses informed her that anyone using or working with tobacco products was violating the Will of God and unless she resigned she would be expelled from the fellowship of Jehovah's Witnesses. The District Court cited *Sherbert* as controlling and held that the denial of benefits violated the claimant's First Amendment right to the free exercise of her religion and ordered benefits to be paid.

The Court of Appeals opinions in *Thomas,* Ind.App., 381 N.E.2d 888, note the distinction in Indiana discussed previously in this opinion, of the standards involved in a voluntary quit case as compared to an availability for work case and the facts that distinguish *Sherbert* from *Lincoln.* We feel *Lincoln, supra,* improperly interpreted *Sherbert* to apply to Lincoln's situation and therefore do not rely on it here.

Thomas sought out work with Blaw-Knox and was hired. It appears from the record that all of Blaw-Knox was involved in the production of armaments. Thomas

worked in the roll foundry and when transferred, worked on the turret line before he voluntarily quit his employment. He also expressed a willingness to return to work in the roll foundry if possible. It is not clear whether Thomas was voicing his objection to continuing work as a personal conviction, or if he were expecting his fellow church members to make this decision for him. It is not apparent that such a decision was ever made. There is no evidence that there was any pressure placed on Thomas, or on his fellow Jehovah's Witness, who continued to work at Blaw-Knox, to quit work. In Thomas' own words he was struggling to determine his position in this matter. He was uncertain as to his precise beliefs and he was concerned about a bomb scare in the plant. This expression of his dilemma does not equal a violation of the kind of cardinal religious tenet at stake in *Sherbert,* involving work on one's Sabbath and the pressure to violate religious precepts or not to work at all.

Here, although the claimant's reasons for quitting work are described as religious, it is unclear what his belief was, and what the religious basis of his belief was. This situation is clearly distinguishable from our recent case, *Bureau of Motor Vehicles* v. *Pentecostal House of Prayer, Inc.,* (1978) ..... Ind. ....., 380 N.E.2d 1225, in which the Indiana Supreme Court fouund Ind. Code §9-1-4-37(b) (Burns Supp. 1977) to be an unconstitutional infringement of the Free Exercise clause of the First Amendment of the United States Constitution and of Art. 1 §2 of the Indiana Constitution. That case involved a photograph requirement for the issuance of driver's license. It was clearly shown that the religious beliefs of the members were derived from a literal reading of the Bible and that the photographic requirement forced them to choose between violating an important religious principle or surrendering their driving privileges. It was held that to require a person to violate a cardinal tenet of his religion effectively penalized the free exercise of constitutional liberties.

In the area of free exercise claims, some broad areas of difference are apparent. The claims of those persons who refuse to perform positive action established by the state are different from the claims of those from whom benefits have been withheld. Claimant's objection to the enforcement of the statute in question as it applies to him is that he will be denied unemployment benefits because he voluntarily quit work for religious reasons. Thomas is not required by statute to violate a cardinal tenet of his religion. Our review of the record here reveals that the basis of claimant's belief is unclear. The precise belief is not articulated. He does not show how the exercise of his religious beliefs is hampered. He is not prevented from seeking, being available for, or accepting new work. He is not deprived of benefits extended to others. *Sherbert* does not require that benefits be extended to this claimant. To so require would be an improper expansion of that holding.

In addition, in considering the basis for awarding or denying unemployment compensation we are also presented with the dilemma noted in the Court of Appeals opinions of the conflict between the Free Exercise Clause under the First Amendment and the Establishment Clause of the First Amendment.

As stated by the United States Supreme Court in *Gillette* v. *United States,* (1971) 401 U.S. 437, 449, 91 S.Ct. 828, 836, 28 L.Ed.2d 168, 180-81:

> "As a general matter it is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion *or on religion as such,* or to favor the adherents of any sect or religious organizations. . . . [T]he Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, *they must be secular in purpose, evenhanded in operation and neutral in primary impact.*" (emphasis added)

Thomas does not ask that benefits be extended to him as they are to others, but that they be extended to him when they are denied to others. To hold that an employee who voluntarily quits work for personal reasons and personal beliefs which can somehow be described as religious beliefs, must be allowed benefits while other employees who voluntarily quit work for valid personal reasons or beliefs which are not "religious" are denied benefits, would violate the Establishment Clause of the First Amendment.

Transfer is granted, and the Court of Appeals opinion is vacated. The Board's decision that the claimant voluntarily left work without good cause in connection with the work and is not entitled to benefits is affirmed.
GIVAN, *C. J.*, and PRENTICE, *J.*, *concur.*
HUNTER, *J.*, dissents with opinion.
DEBRULER, *J.*, dissents with opinion.

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IN THE

SUPREME COURT OF INDIANA

EDDIE S. THOMAS,

Appellant (Claimant),

vs.

REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, William H. Skinner, J. Frank Haley, and Ralph Miles, as Members and as constituting the Review Board of Indiana Employment Security Division, and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Appellees.

Supreme Court
No. 779 S 192
Court of Appeals
No. 2-1276-A-491
(381 N.E. 2d 888)

APPEAL FROM THE DECISION OF THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION ON PETITION TO TRANSFER

HUNTER, *J.*—Dissenting

In order to resolve the issue in the case at bar, it is not necessary to delve into Indiana law, including prior decisions of this Court and the Court of Appeals, regarding what does or does not constitute "good cause in connection with the work," Ind. Code § 22-4-15-1 (Burns Supp. 1978), for one voluntarily terminating his employment. Respondent on transfer is not complaining that petitioner has acted improperly under the statute. Rather, the issue here is whether respondent, Eddie C. Thomas, was properly disqualified for unemployment benefits in light of his claim that this disqualification violates his First Amendment guarantee of free exercise of his religion.

The case of *Sherbert* v. *Verner,* (1963) 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965, would appear to be controlling here. In that case a Seventh-Day Adventist was fired by her employer and thereafter refused other employment because of her refusal to work on Saturday, the Sabbath day of her faith. The South Carolina Employment Security Commission refused Sherbert unemployment compensation because of her refusal to work Saturdays.

In the instant case, Thomas, a Jehovah's Witness, quit his job with Blaw-Knox Foundry & Machinery, Inc. shortly after being transferred from the roll foundry to the turret line, an area of the plant directly involved in armaments manufacture. The *referee,* whose decision was adopted by the Indiana Employment Security Review Board, found that Thomas "did quit due to religious convictions." *Thomas* v. *Review Board of Ind. Emp. Sec. Div.,* (1978) ..... Ind. App. ..... 381 N.E. 2d 888, 890.

The majority opinion observes "significant differences" between Thomas's situation and Adell Sherbert's situation. The majority correctly notes the United States Supreme Court emphasized the general discriminatory effect of the disqualification in *Sherbert* v. *Verner, supra,*

because South Carolina expressly saved "the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty." 374 U.S. at 406, 83 S.Ct. 1795, 10 L. Ed. 2d at 971. To overemphasize this discriminatory factor is to miss the import of the *Sherbert* decision.

The *Sherbert* case did not turn on the discriminatory effect of the disqualification. The United States Supreme Court has noted that the *Sherbert*

> "decision turned upon the fact that '[t]he ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.' " [citation omitted.] *McDaniel* v. *Party,* 435 U.S. 618, 633, 98 S. Ct. 122, 1331, 55 L. Ed. 2d 593, 605. (Separate opinion by Brennan, J., in which Marshall, J., joined.)

The District Court in *Lincoln* v. *True,* (W. D. Ky. 1975) 408 F.Supp.22 made a similar conclusion and it is my belief that that case was properly decided. Thomas, Adell Sherbert and Ethel Lincoln, a Jehovah's Witness who quit her job with a tobacco company, where she had worked for twenty-one years, because of her religious convictions, were all forced to the same choice.

An inquiry by this Court into whether Thomas's convictions are religious would be improper in this case. As stated above, the facts as found by the referee, and as adopted by the Review Board, indicate that Thomas did indeed quit his job due to his religious convictions. Furthermore, this Court should not pick apart a religious adherent's beliefs because he is "struggling" with his position or because his beliefs are not eloquently stated. Neither should we distinguish between literal and interpretive readings of religious scriptures nor distinguish among so-called "cardinal tenets" of various religions.

I am cognizant of the limited nature of the decision in *Sherbert* v. *Verner, supra.*

> "Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." 374 U.S. at 410, 83 S.Ct. at 1797, 10 L. Ed. 2d at 974.

In fact the high Court said:

> "Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment." 374 U.S. at 409-10, 83 S.Ct. at 1797, 10 L. Ed. 2d at 974.

But in their next sentence the Court withdrew from that broad disclaimer.

> "This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society." 374 U.S. at 410, 83 S.Ct. at 1797, 10 L. Ed. 2d at 974.

Like Adell Sherbert, Eddie Thomas was willing to work in a job which would not conflict with his religious convictions. He stated that he was willing to return to the Blaw-Knox roll foundry, which had been closed down precipitating his transfer. A reviewing court cannot say when and in what job a religious adherent compromises his beliefs as the dissent to the Court of Appeals decision in *Thomas, supra,* suggests. The fact that Thomas is willing to return to a neutral position at Blaw Knox no more diminishes his religious convictions than his willingness to work at another level in the military-industrial chain, such as a raw material supplier. Thus Thomas's religious convictions do not "serve to make him a nonproductive member of society." *Sherbert, supra,* 374 U.S. at 410, 83 S. Ct. at 1797, 10 L. Ed. 2d at 974. *We are dealing here with a person's action pursuant to his deligious beliefs, and cannot properly tell a litigant that he has misinterpreted his own beliefs.*

Comments in the dissent to the Court of Appeals decision bring to mind Isaac Backus's admonition regarding religious intolerance in colonial Massachusetts in his comprehensive Appeal to the Public for Religious Liberty, written in 1773, a time of debate which fashioned our religious liberties.

> "Yes, some minorities are tolerated in Massachusetts; but some are not, and the procedure of deciding which are and which are not worthy of this privilege gives to a group of civil magistrates—a body which, since each man must speak for himself before God, cannot in the nature of things represent anyone in matters of religion—the power of passing judgment on 'the *springs* of their neighbors' actions.' You are condemned, he told the Massachusetts magistrates, out of your own mouths, for you say that England cannot in right tax beyond her own domain: "have we not as good right to say you do the *same thing,* and so that wherein you judge others you condemn yourselves?' " [Emphasis in original.][1]

Theologians have made similar statements indicating that living pursuant to religious convictions is a matter of individual conscience and not a response to objective, doctrinaire theory on which strangers—be they church elders, administrative referees or judge—may pass judgment.

> "[Religious] freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that in religious matters no one is to be forced to act in a mainer contrary to his own conscience; *nor is he to be impeded from acting according to his own conscience,* whether privately or publicly, whether

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[1] Paraphrased in B. Bailyn, *The Ideological Origins of the American Revolution,* Belknap Press, Cambridge, Mass. 1972, p. 266-267.

alone or in association with others, within due limits." [Emphasis added.][2]

"A sense of dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man, and the demand is increasingly made that men *should act on their own judgment,* enjoying and making use of a responsible freedom, not driven by coercion but motivated by a sense of duty." [Emphasis added.][3]

An individual in this nation should be free to seek religious truth and duty in a manner which accords with his or her nature and cannot be denied the benefits of public welfare legislation thereby.

The Court of Appeals decision in this case in no way fosters the establishment of the Jehovah's Witnesses religion in this state. It merely reflects "the governmental obligation of neutrality in the face of religious differences." *Sherbert* v. *Verner, supra,* 374 U.S. at 309, 83 S. Ct. at 1797, 10 L. Ed. 2d at 974. The dissent in *Thomas, supra,* and the majority opinion here raise the same argument that was raised by Justice Harlan in his dissent in *Sherbert, supra,* which was specifically rejected by Justice Brennan's majority opinion.

For the foregoing reasons, I believe the opinion of the Court of Appeals should stand and would, therefore, deny transfer.

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[2] *Dignitatis Humanae,* No. 2, Found in A.F.C. DeAlbornoz, *Religious Liberty Sheed & Ward New York,* 1967 p. 12.

[3] *Dignitatis Humanae,* No. 1, DeAlbornoz, *supra,* p. 15.

No. 779 S 192
(Court of Appeals No. 2-1276-A-491)

IN THE

SUPREME COURT OF INDIANA

EDDIE C. THOMAS,

Appellant (Claimant),

vs.

REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, William H. Skinner, J. Frank Haley, and Ralph Miles, as Member and as constituting the Review Board of Indiana Employment Security Division, and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Appellees.

APPEAL FROM THE DECISION OF THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION ON PETITION TO TRANSFER

DONALD H. HUNTER, *Justice*

Dissenting Opinion

Clerk
Reporter
West
Bobbs-Merrill

In The

SUPREME COURT OF INDIANA

EDDIE C. THOMAS,

Appellant,

vs.

REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, and BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Appellees.

No. 77 S 192

ON PETITION TO TRANSFER

DeBRULER, J. - Dissenting

Every working person who is covered by the Indiana Employment Security Act has it in his mind that he can expect either a paycheck *or* a benefit check to live on. Adell Sherbert's decision to refuse to accept a new job which would have required her to work on Saturdays, the day she and the church she belonged to regarded as a day to be set aside for rest and worship, removed her from the class having this dual expectancy. Eddie Thomas' decision to refuse to work at a new job for his employer which required him to participate directly in fabricating army tanks, because he and the church to which he belonged regarded such work as making one a direct party with those who would ultimately use the tanks, effectively removed him from the same class. Both were disqualified for benefits because of conduct dictated by their religious beliefs. The United States Supreme Court in *Sherbert* v. *Verner,* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965, held that Sherbert's disqualification as a beneficiary represented an abridgment of her right to the free exercise of her religion secured under the Free Exercise Clause of the First Amendment through the Fourteenth Amendment. I find no reason to conclude that Thomas should not be accorded the same constitutional protection for the free exercise of his religious be-

lief. Salient here is the limitation which the Supreme Court placed upon its holding in *Sherbert* in the following passage:

> "Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment. This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society." 374 U.S. at 409-10, 83 S.Ct. at 1797.

Both Sherbert and Thomas following the conduct dictated by their religious beliefs, remained ready, willing and available to work at a multitude of jobs. Sherbert was available to work at jobs which did not require Saturday attendance. Thomas was available to work at jobs which did not involve the production of armaments. Both were only temporarily in need of unemployment compensation and therefore clearly come under the Constitution's protective umbrella.

STATE OF INDIANA
Indianapolis, 46204
Telephone 633-5200

No. 779S192

Eddie C. Thomas v. Review Board of the Ind. Employ. Sec. Div.

You are hereby notified that the Supreme Court has on this day Denied Appellant's Petition for Rehearing. GIVAN, *C.J.*

GIVAN, *C.J.*, *Prentice, J.*, concur
HUNTER and DEBRULER, *JJ.*, dissents

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 20th day of September, 1979.

/s/ Billie R. McCULLOUGH
Billie R. McCULLOUGH

.....
Clerk Supreme Court and Court of *Appeals*

Supreme Court, U. S.
FILED
APR 3 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-952

EDDIE C. THOMAS,

Petitioner,

vs.

REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, WILLIAM H. SKINNER, J. FRANK HALEY, and RALPH MILES, as members and as constituting the Review Board of the Indiana Employment Security Division.

and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITION FOR CERTIORARI FILED DECEMBER 18, 1979
(PETITION GRANTED FEBRUARY 19, 1980)

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The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the Appendix to the printed Petition for Certiorari:

Decision of the Appeals Referee .....See Appendix 1a

Decision of the Review Board of the Indiana Employment Security Division .....See Appendix 4a

Decision of the Indiana Court of Appeals .....See Appendix 6a

a) Dissent of Chief Justice Buchanan .....See Appendix 20a

Denial of Petition for Rehearing .....See Appendix 25a

Decision of the Supreme Court of Indiana .....See Appendix 26a

a) Dissent of Justice Hunter .....See Appendix 40a

b) Dissent of Justice DeBruler .....See Appendix 47a

Denial of Rehearing .....See Appendix 49a

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-952

EDDIE C. THOMAS
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ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

PETITION FOR CERTIORARI
FILED DECEMBER 18, 1979
(PETITION GRANTED FEBRUARY 19, 1980)

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 6, 1975	Eddie C. Thomas' claim for unemployment compensation benefits filed with the Indiana Employment Security Division, in Gary, Indiana.
December 11, 1975	Claims deputy denies Eddie C. Thomas' claim for unemployment compensation benefits; Request for hearing before Appeals Referee.
January 27, 1976	Hearing held before Appeals Referee Charles F. Marlowe. Claimant Eddie C. Thomas appears and testifies without counsel.
February 24, 1976	Decision of the Appeals Referee denying unemployment compensation benefits to Eddie C. Thomas.
March 5, 1976	Eddie C. Thomas files request for review with the Review Board of the Indiana Employment Security Division.
November 9, 1976	Hearing before the Review Board of the Indiana Employment Security Division. Claim reviewed on record.
November 29, 1976	Decision of the Review Board affirming the Appeals Referee's decision.
December 6, 1976	Claimant, by counsel, Legal Aid Society of Gary, Inc., files Notice of Intention to Appeal to the Indiana Court of Appeals.

December 20, 1976	Record of proceedings and assignment of errors filed in the Indiana Court of Appeals.
February 18, 1977	Appellant-claimant files brief on the merits and Motion for Oral Argument.
March 25, 1977	Appelles brief is filed.
August 16, 1978	Oral arguments before Indiana Court of Appeals.
October 26,1978	The decision of the Review Board is reversed and remanded with instructions. Opinion of the majority delivered by Sullivan, J.; Shields, J. concurs. Buchanan, C. J., dissented with opinion.
November 14, 1978	Petition for rehearing and Memorandum in Support thereof filed by appellees.
November 22, 1978	Appellee's Petition for rehearing denied. Buchanan Jr., C. J.
December 12, 1978	Appellee Board's Petition for Transfer and memorandum in support thereof is filed in the Indiana Supreme Court.
December 21, 1978	Appellant-claimant files Brief in Opposition to Transfer.

July 18, 1979	Appellee Board's Petition to Transfer is granted with opinion. Givan, C. J. Transfer is granted, the opinion of the Court of Appeals is vacated. The Board's decision that the claimant voluntarily left work without good cause in connection with the work and is not entitled to benefits is affirmed. Pivarnik, J.; Givan, C. J. and Prentice, J. concur. Hunter, J. dissented with opinion, DeBruler, J. dissented with opinion.
August 6, 1979	Claimants Petition for Rehearing filed.
September 20, 1979	Appellant's Petition for rehearing denied. Givan, C.J.; Prentice, J. concur. Hunter, J. and DeBruler, J. dissent.
February 19, 1980	Petition for a Writ of Certiorari to the Supreme Court of Indiana is granted by the U.S. Supreme Court.

Supreme Court, U. S.
FILED
JAN 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-952

EDDIE C. THOMAS,

Petitioner,

VS.

THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, WILLIAM H. SKINNER, J. FRANK HALEY, and RALPH MILES, as members and constituting the Review Board of the Indiana Employment Security Division,
and
BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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Respondents, Review Board of the Indiana Employment Security Division, William H. Skinner, J. Frank Haley, Ralph Miles, and Blaw-Knox Foundry & Machinery, Inc., respectfully pray this Court to deny issuance of a writ of certiorari to the Indiana Supreme Court, thereby refusing to review the decision entered by that Court in cause number 779 S 192 on July 18, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana appears at 391 N.E. 2d 1127 and is appended to the Petition for Writ of Certiorari. The Supreme Court of Indiana granted the respondents' Petition for Transfer, filed after the Court of Appeals had reversed the decision the referee of the Indiana Employment Security Division. The decision of the Court of Appeals of Indiana appears at 381 N.E. 2d 888, also appended to the Petition for Writ of Certiorari. The Supreme Court of Indiana denied a Petition for Rehearing in an unpublished order of September 20, 1979.

JURISDICTION

Petitioner alleges jurisdiction in this Court pursuant to 28 U.S.C. § 1257(3), ostensibly on the basis that the Indiana Supreme Court had declared a state statute valid, alleged to contravene First Amendment rights to freedom of religion under the Constitution of the United States, on federal grounds. Respondents contend that the Indiana Supreme Court based its decision, on independent, non-federal grounds. Respondents assert, therefore, that this Court has no jurisdiction to issue the writ prayed for since Petitioner has not presented a federal question of substance.

QUESTIONS PRESENTED FOR REVIEW

The Respondents would assert that the issue presented at this time is whether the Petitioner has properly presented to this Court a federal question of substance.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Indiana Code § 22-4-1-1 (Burns 1974) reads as follows:

As a guide to the interpretation and application of this act the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is declared hereby to be a serious menace to the health, morale and welfare of the people of this state and to the maintenance of public order within this state. Protection against this great hazard of our economic life can be provided in some measure by the required and systematic accumulation of funds during periods of employment to provide benefits to the unemployed during periods of unemployment and by encouragement of desirable stable employment. The enactment of this measure to provide for payment of benefits to persons unemployed through no fault of their own, to encourage stabilization in employment, and to provide for a state employment service is, therefore, essential to public welfare; and the same is declared to be a proper exercise of the police powers of the state.

Indiana Code § 22-4-15-1 (Burns 1974) reads as follows:

"With respect to benefit periods including extended benefit periods established subsequent to July 6, 1974, and before July 3, 1977, an individual who has voluntarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause shall be ineligible for waiting period or benefit rights for the week in which the disqualifying separation occurred and until he has subsequently earned remuneration in employment equal to or exceeding the weekly benefit amount of his claim in each of ten

(10) weeks. The weeks of a disqualification period remaining at the expiration of an individual's benefit period will be carried forward to an extended benefit period or to the benefit of a subsequent claim only if the first week of such extended benefit period or subsequent benefit period falls within ten (10) consecutive weeks from the beginning of the disqualification period imposed on the prior claim."

STATEMENT OF THE CASE

Petitioner Eddie C. Thomas filed claim for unemployment compensation benefits upon termination of his employment with Blaw-Knox Foundry & Machinery, Inc. (hereafter Blaw-Knox). The Indiana Employment Security Division made an initial determination on December 11, 1975, that Petitioner was not eligible for benefits because he had voluntarily left his employment without good cause in connection with the work. On that same date, Petitioner filed his Request for Hearing Before Referee. The referee affirmed the initial determination.

Petitioner thereupon filed his Request for Appeal to Review Board on March 5, 1976. On November 30, 1976, the Review Board of the Indiana Employment Security Division affirmed the referee decision.

Thereupon, Petitioner filed an appeal before the Court of Appeals of Indiana. That Court reversed the Review Board's decision on October 26, 1978. A Petition for Rehearing was denied without opinion on November 22, 1978.

The Supreme Court of Indiana reversed the Court of Appeals on July 18, 1979. The Petitioner's Petition for Rehearing was denied on September 20, 1979. The relevant decisions and opinions are appended to the Petition for Writ of Certiorari.

REASONS FOR DISALLOWANCE OF THE WRIT

The Petitioner has not properly presented to this Court a federal question of substance. The Supreme Court of Indiana in affirming the administrative determination that Petitioner did not qualify for unemployment benefits based its decision on three (3) nonfederal, independent grounds.

First, the Supreme Court of Indiana found that Petitioner failed to establish "good cause" for abandoning his empoyment. The Indiana Court of appeals, in *Gray v. Dobbs House, Inc.* 357 N.E. 2d 900 (1976), has held that an employee who has voluntarily quit, to avoid disqualification must establish:

> "(a) that his reasons for abandoning his employment were such as would impel a reasonably prudent man to terminate under the same or similar circumstances; and (b) that these reasons, or causes, are objectively related to the employment." 357 N.E. 2d at 903.

This standard is in keeping with purposes of the employment compensation act as is set forth in Ind. Code § 22-4-1-1 (Burns 1974). It is obvious from reading said statute that the purpose of such legislation is to protect the people of Indiana from menacing periods of unemployment, to encourage stable employment and to provide benefits for persons unemployed through no fault of their own. Voluntary unemployment is not compensable unless good cause existed which justifies the termination. This good cause must be job-related and objective in character, not just personal, subjective reasons unique to the employee. *Geckler v. Review Board of Indiana Employment Security Division,* 244 Ind. 473, 193 N.E. 2d 357 (1963).

Secondly, the Supreme Court of Indiana found that Petitioner failed to show what, if any, religious tenet would

be violated by his continued employment. As the Court noted in its decision appended to the Petition for Writ of Certiorari there is no evidence below that Petitioner's fellow church members ever determined if his continuing to work at Blaw-Knox would violate any tenet of their religion and there is no evidence that his church put any pressure on Petitioner to quit; in fact, Petitioner was uncertain as to his precise beliefs and was concerned about a bomb scare in the plant.

Thirdly, the Court found an award of benefits to persons who abandoned a job for "religious" reasons would amount to support of religion where persons who quit because of "personal" principals are denied benefits. The Supreme Court of Indiana noted in its decision Petitioner does not ask that benefits be extended to him as they are to others, but that they be extended to him when they are denied to others.

Assuming, *arguendo*, that Petitioner's argument regarding Indiana Code § 22-4-15-1 (Burns 1974) presented a federal question, his situation can be distinguished from the case authority he cites, *Sherbert v. Verner,* 374 U.S. 398, 83 S. Ct. 1790 (1963). In *Sherbert,* a Seventh Day Adventist was disqualified from receiving unemployment compensation when her refusal to work Saturdays, her Sabbath, caused employers to refuse to hire her and resulted in her being disallowed benefits because of her failure to accept suitable employment. The United States Supreme Court emphasized the general discriminatory effect of such a disqualification on Sabbatarians as compared to Sunday worshippers for whom it was provided that no employee would jeopardize seniority nor be discriminated against in any manner for refusal to work on Sunday.

The Court in *Sherbert* stated that it was not declaring that a constitutional right to unemployment benefits exists on the part of all persons whose religious convictions are the cause of their unemployment, and specifically limited its holding to the specific facts of that case.

If a state enacts a general law, within their power, which imposes only an indirect burden on religious observance but makes no religious practice unlawful, and its purpose and effect is to advance the state's secular goals such statute is valid. *Braunfeld v. Braun,* 366 U.S. 599, 81 S. Ct. 1147 (1961). Clearly, the burden, if any, imposed by the statute in question, Ind. Code § 22-4-15-1 (Burns 1974) is indirect.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari to the Supreme Court of Indiana should be denied.

Respectfully submitted,

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BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

On February 24, 1976, the Referee of the Indiana Employment Security Division entered his decision in the instant case, Petitioner's Appendix pp. 1a-3a, contained in the Petition for Certiorari, and hereinafter referred to as "Pet. App." The Review Board of the Indiana Employment Security Division affirmed the Referee's decision on November 29, 1976, Pet. App. pp. 4a-5a. Petitioner appealed

and on October 26, 1978, the Court of Appeals of Indiana rendered a decision favorable to the appellant, which decision is reported in *Thomas* v. *Review Board of Indiana Employment Security Division* ..... Ind. App. .....; 381 N.E. 2d 888 (1978); Pet. App. pp. 6a-24a. Rehearing was denied in an unpublished order of November 22, 1978, Pet. App. p. 25a. The opinion of the Supreme Court of Indiana, entered on July 18, 1979, is reported at ..... Ind. ....., 391 N.E.2d 1127 (1979), Pet. App. pp. 26a-48a. A petition for rehearing was subsequently denied in an unpublished order of September 20, 1979, Pet. App. p. 49a.

JURISDICTION

The judgment to be reviewed is the July 18, 1979, opinion and order of the Supreme Court of Indiana, Pet. App. pp. 26a-48a, which reversed the decision rendered by the Court of Appeals of Indiana in the instant case. A petition for rehearing in the Indiana Supreme Court was denied on September 20, 1979, Pet. App. p. 49a. The Petition for a Writ of Certiorari was filed on December 18, 1979, and was granted by this Court on February 19, 1980. Jurisdiction is conferred on this Court by 28 U.S.C.A. § 1257 (3).

QUESTION PRESENTED

Whether the application of the disqualifying provisions of the Indiana Employment Security Act, Indiana Code 22-4-15-1, (Burns Code Ed., 1974) to the petitioner, a Jehovah's Witness, constitutes a denial of his First Amendment right to the free exercise of religion when he voluntarily terminated his employment in an armament factory because his religious beliefs prevented him from participating in the production of armaments or in any war related activities.

STATUTES AND AMENDMENTS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Amendment XIV.

With respect to benefit periods including extended benefit periods established subsequent to July 6, 1974, and before July 3, 1977, an individual who has voluntarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause shall be ineligible for waiting period or benefits rights for the week in which the disqualifying separation occurred and until he has subsequently earned remuneration in employment equal to or exceeding the weekly benefit amount of his claim in each of ten (10) weeks. The weeks of a disqualification period remaining at the expiration of an individual's benefit period will be

carried forward to an extended benefit period or to the benefit of a subsequent claim only if the first week of such extended benefit period or subsequent period falls within ten (10) consecutive weeks from the beginning of the disqualification period imposed on the prior claim. Indiana Employment Security Act, Chapter, Section 1; Indiana Code 22-4-15-1, (Burns Code Ed; 1979 Supp.)

STATEMENT OF THE CASE

The petitioner, Eddie C. Thomas, was hired as a chainman "hooker" in the roll foundry by respondent, Blaw-Knox Foundry and Machinery Company, Inc., (hereinafter referred to as Blaw-Knox). On his initial application form, petitioner indicated a religious belief of Jehovah's Witness, and his hobbies as Bible study and Bible reading. Petitioner worked in the roll foundry for approximately a year and performed his job satisfactorily. When this division of Blaw-Knox was permanently closed in November, 1975, he was transferred to another department where he began working in the production of turrets for tanks, a department also known as the turret line. Upon commencing his job in that department, petitioner realized that his new job directly involved the manufacture of armaments, an activity strictly prohibited by his religion. Petitioner searched for a transfer to another department at Blaw-Knox that would not be armament related, but found that all of the remaining departments of the company were engaged in the production of items used in the advancement of war. After management's denial of his request for a lay-off, petitioner voluntarily terminated his employment with Blaw-

Knox on November 6, 1975, due to his religious beliefs. See generally, Pet. App. pp. 2a-3a.

Petitioner filed a claim for unemployment benefits on November 6, 1975, the same day he quit his job. An administrative hearing before a Referee was held on January 27, 1976; petitioner appeared and testified at the hearing. He was unrepresented by counsel. In his Findings and Conclusions, dated February 24, 1976, the Referee indicated:

> . . . the evidence reveals that approximate (sic.) two to three weeks prior to the claimant's date of leaving, the 'roll foundry' was closed permanently and claimant was transferred to the terret (sic.) line. Claimant, at this time, real (sic.) realized that all of the other functions at Blaw-Knox were engaged in producing arms for the Armament Industry. Claimant's religious beliefs specifically exempts claimant from producing or aiding in the manufacture of items used in the advancement of war.

Pet. App. p. 2a. The Referee concluded that the petitioner "quit due to his religious convictions," but that he had the burden of "going forward and establishing good cause in connection with the work, and that claimant has not done so in this case." Pet. App. p. 3a. The Referee noted that it was Thomas who had placed the special conditions upon his work and that another Jehovah's Witness continued to work for Blaw-Knox. Pet. App. 3a.

Thomas then filed a timely appeal to the Indiana Employment Security Division Review Board (hereinafter referred to as Board). In its decision of November 29, 1976, the Board adopted the Findings and Conclusions of the Referee. The Board also found that Thomas

> . . . left his employment voluntarily because his religious beliefs as a Jehovah's Witness would not allow him to continue to work producing arms, after being transferred from his original department which was not engaged in the manufacture of items used in the advancement of war.

Pet. App. p. 5a. The Board, however, affirmed the Referee's decision that Thomas left his employment without good cause in connection with the work and that the statutory penalty should be imposed. Pet. App. p. 5a. The statutory penalty includes ineligibility for benefits, and both a waiting period and an earning requirement before future eligibility for unemployment benefits can be established. Ind. Code 22-4-15-1 (Burns Code Ed., 1979 Supp.).

At this point, the Legal Aid Society of Gary, Inc., entered the case on Thomas' behalf and an appeal was filed before the Indiana Court of Appeals. Appellant Thomas alleged that the Board had erred in concluding that he quit his employment without good cause in connection with the work, that the denial of unemployment benefits in this case violated his First Amendment right to the free exercise of religion, and that there was no compelling state interest to justify such an infringement. In its October 26, 1978 decision, the Court of Appeals held:

> Under the authority of *Sherbert,* we are compelled to hold that the disqualifying provision of I.C. 22-4-15-1 (Burns Code Ed., 1979 Supp.), as it applies to Thomas, casts an impermissible burden on his First Amendment guarantee to the free exercise of his religion. Because the Board has conceded that no "compelling state interest" exists to justify such a burden, we must hold that the statute is unconstitutional as applied to Thomas.

> The judgment is reversed and the cause remanded with directions that the Board enter an award not inconsistent with this opinion.

Pet. App. 19a. One Justice of the Court of Appeals dissented from this decision.

The Indiana Court of Appeals decision came before the Supreme Court of Indiana on a Petition to Transfer filed by the Board. In a 3-2 decision, the court reversed the appellate court. Associate Justice Pivarnik delivered the opinion of the court, two justices concurring with him. Justice Pivarnik concluded that Thomas' reasons for quitting were personal, not clearly stated, not objectively related to the employment, and that Thomas was not required to violate a cardinal tenet of his religion; Thomas' right to the free exercise of religion had thus not been violated. The majority found *Sherbert* v. *Verner,* 374 U.S. 398 (1963) did not require Indiana to provide unemployment compensation benefits to Thomas. The court also held that to grant benefits to Thomas, while denying them to other employees who quit for personal or non-religious reasons, would violate the establishment clause of the First Amendment. Pet. App. pp. 26a-39a. Justices Hunter and DeBruler dissented and wrote opinions; both found this court's decision in *Sherbert* v. *Verner, supra,* to be controlling on the facts presented.

Petitioner, Eddie C. Thomas, then timely filed his Petition for Writ of Certiorari to the Supreme Court of Indiana. The petition was granted by this court on February 19, 1980.

SUMMARY OF ARGUMENT

The petitioner, a Jehovah's Witness, was hired to work in the roll foundry at Blaw-Knox. Approximately one year after his hiring, the foundry was permanently closed, and petitioner was transferred to another division of the plant, the turret line, which was directly involved in the manufacture of tanks. Unable to square his religious convictions with such direct involvement in the manufacture of armaments, petitioner searched for a way to reconcile his religious beliefs with his employment through transfer, lay-off, etc. No alternative proved possible, and petitioner voluntarily resigned his job.

He then sought unemployment compensation benefits which were denied by the Appeals Referee and the Indiana Employment Security Division Review Board. Although both found Thomas left his employment because his religious beliefs would not allow him to manufacture arms, both held the termination not to be "good cause in connection with the work" as required by Ind. Code 22-4-15-1. (Burns Code Ed. (1979 Supp.). Thomas appealed to the Indiana Court of Appeals which held *Sherbert* v. *Verner,* 374 U.S. 398 (1963) to be controlling. The Indiana Supreme Court reversed, found *Sherbert* not applicable, and upheld the Board's denial of benefits.

(a) The Indiana Supreme Court misinterpreted and misapplied *Sherbert* which directly controls the present case. The denial of unemployment compensation benefits derives solely from the belief and practices of Thomas' religion, and unconstitutionally forces him to choose between following the precepts of his religion and forfeiting benefits, or abandoning the precepts of his religion to remain employed. See *McDaniel* v. *Paty,* 435 U.S. 618 (1978). The actions of the state Board penalize Thomas

for the exercise of his religious beliefs and are a deterrent to the same. The inquiry by the Indiana Supreme Court into Thomas' religious beliefs was improper and contrary to law.

The fact that another Jehovah's Witness was able to accomodate his religious beliefs to such work is irrelevant to Thomas. The penalty for the exercise of his religious beliefs is direct and unmistakable, and the state has previously conceded that no compelling state interest is present in this case.

(b) The Indiana Supreme Court held that to grant unemployment compensation benefits to Thomas would amount to a forbidden "establishment of religion." There is no basis for such a conclusion. The grant of benefits here clearly has a secular purpose, its primary effect is not to advance religion, and does not entangle the state in any way with religion. *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). Rather, the benefits simply prevent the imposition of a penalty for petitioner's exercise of his religious beliefs. *Sherbert* v. *Verner,* supra.

ARGUMENT

I.

THE DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS TO PETITIONER, A JEHOVAH'S WITNESS, WHO VOLUNTARILY TERMINAED HIS EMPLOYMENT IN THE ARMS PRODUCING SECTION OF A FACTORY, VIOLATES PETITIONER'S FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF RELIGION.

A.

Introduction

For decades, this court has zealously safeguarded the religious freedom of citizens against intrusion by governmental action. Whether the interference with that freedom was by means of a direct prohibition, see *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940), or by forcing individuals to choose between governmental benefits and their religiously inspired beliefs, see *Sherbert* v. *Verner,* 374 U.S. 398 (1963), this court has consistently acted to protect the inviolability of religious conscience. The present case is another instance in which a religiously motivated individual seeks protection against governmental intrusion into the realm of religious belief.

The petitioner, Eddie C. Thomas, left his employment because his religious beliefs as a Jehovah's Witness would not allow him to work in a part of his employer's factory which produced arms. The Jehovah's Witnesses are no strangers to the federal judiciary; indeed, a good deal of First Amendment law has been constructed around their activities and beliefs. See, e.g., *Cantwell* v. *Connecticut,* supra; *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Niemotko* v.

State of Maryland, 340 U.S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1963); *Lincoln* v. *True,* 408 F. Supp. 22 (W.D. Ky. 1975); *Redmond* v. *Gaf Corp.,* 574 F.2d 897 (7th Cir. 1978). Their characteristics are well known:

> The Witnesses are an ultra and uncompromising religious sect whose members profess allegiance to a visionary heavenly kingdom and disclaim all duties of citizenship which they deem in conflict with such heavenly allegiance. In the utmost good faith they unhesitatingly choose to suffer rather than to abate one jot or tittle their zealously held doctrine of primary responsibility to the super-mundane sovereignty which they consider themselves bound to serve.

United States ex. rel. Hoce v. *McGinnis,* 56 F.Supp. 668 (S.D. W.Va. 1944), at 668.

This court has traditionally carved a special and "preferred" position for First Amendment rights generally, and religious rights in particular. *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943). The value placed upon religious freedom in our society requires that the courts, as the guardian of individual rights, zealously protect religious belief and exercise. As with other First Amendment rights, "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society." *NAACP* v. *Button,* 371 U.S. 415, 433 (1963).

Inevitably, individual rights and societal and governmental needs interact. In such situation, reflecting basic First Amendment values, the standard formulation of the test to be applied where free exercise claims are raised is that if the challenged state action is to withstand constitutional challenge

> it must be either because her disqualification as a beneficiary represents no infringement by the state of her constitutional rights of free exercise, or be-

> cause an incidental burden on the free exercise of Appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the state's constitutional power to regulate . . ."

Sherbert v. *Verner,* 374 U.S. 398, 403 (1963). *See also, generally Speiser* v. *Randall,* 357 U.S. 513 (1958). In its oral argument before the Indiana Court of Appeals, the respondent Board conceded that in the event an infringement of petitioner's freedom of religion was found, no compelling state interest could be offered in justification. Pet. App. p. 13a; 381 N.E.2d 888, 892, (1979).

The actions of the Indiana administrative officials, and the decision by the Indiana Supreme Court in this matter, fail to pass muster under uniformly accepted and consistently applied constitutional principles and cases. Those actions must be reversed by this court.

B.

Petitioner's Disqualification For Unemployment Compensation Benefits Is A Direct Burden On His Right To Free Exercise Of Religion And Is Directly Contrary To Sherbert v. Verner.

The Indiana Supreme Court decision is directly contrary to the decision in *Sherbert* v. *Verner,* 374 U.S. 398 (1963) and thus must be reversed. The uncontroverted evidence shows that petitioner was involuntarily transferred from the roll foundry to an armament producing division of his employer's factory. Despite his best efforts to secure a transfer to a non armaments portion of his employer's business, or to secure a lay-off, petitioner was thus constrained to terminate his employment because of his religious beliefs as a Jehovah's Witness. The denial of unemployment benefits is consequently a direct penalty and burden for his exercise of religious beliefs. This is

a result that Indiana, under the First and Fourteenth Amendments, may not constitutionally achieve.

In *Sherbert, supra,* a Seventh Day Adventist was discharged by her employer for her refusal to work on Saturday, the Sabbath of her faith. Thereafter, she was unable to obtain other employment because of the requirement of Saturday work. Her claim for unemployment compensation benefits was denied by the state of South Carolina on the grounds that she had failed, without good cause, to accept suitable work when offered. The denial was upheld on judicial review and affirmed by the Supreme Court of South Carolina. Mrs. Sherbert appealed to the United States Supreme Court, contending that the disqualification abridged her First Amendment right to the free exercise of religion. This Court reversed and held:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand, Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. Nor may the South Carolina's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Sherbert v. *Verner,* 374 U.S. 398, 404. Because the State offered no persuasive "compelling interest" to justify this infringement, the Court held that for constitutional reasons the state was required to exempt her from its Saturday availability requirement.

Relying on this analysis, this Court recently held unconstitutional a Tennessee statutory provision disqualifying ministers as candidates for delegates to the State Constitutional Convention because it violated appellant's First and Fourteenth Amendment rights. *McDaniel* v. *Paty,* 435 U.S. 618 (1978). Chief Justice Burger delivered the opinion of the majority holding, at 626:

> Yet under the clergy disqualification provisions, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is "punishing a religious profession with the privation of a civil right." 5 The Writings of James Madison 288 (G. Hunt ed. 1904). In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion "[T]o condition the availability of benefits (including access to the ballot) upon this appellant's willingness to violate a cardinal principle of (his) religious faith (by surrendering his religiously impelled ministery) effectively penalizes the free exercise of (his) constitutional liberties." *Sherbert* v. *Verner,* 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed. 2d 965 (1963).

As in *Sherbert, supra,* the Court found no compelling state interest to justify an infringement on McDaniel's First Amendment rights.

Thomas's situation is strikingly similar to Adelle Sherbert's as an analysis of the facts and circumstances in each case reveals. Adelle Sherbert was a member of the Seventh-Day Adventist Church and as such was obligated

not to work on Saturdays. Eddie C. Thomas is a Jehovah's Witness and his religious beliefs specifically forbid him from producing or aiding in the manufacture of items used in the advancement of war. When Adelle Sherbert began working with Spartan Mills, her last place of employment, and up to 1959, she was not required to work Saturdays and therefore, her job was not in conflict with her religious beliefs. Likewise, Thomas joined Blaw-Knox in 1974 and was hired to work in the Roll Foundry, a "department which was not engaged in the manufacture of items used in the advancement of war", Pet. App. p. 5a; there was at that time no conflict with his religious convictions.

Circumstances changed for both Sherbert and Thomas. Spartan Mills' work week was changed to six days, including Saturdays, and Adelle Sherbert was then required to work Saturdays in clear violation of her religious beliefs. In the instant case, petitioner Thomas was transferred from the Roll Foundry to the turret line, a division of the company directly engaged in the production of armaments, an activity strictly prohibited by his religion. When confronted with the dilemma of employment directly contrary to religious convictions, both Adelle Sherbert and Eddie C. Thomas chose the latter, and as a result, she was discharged and he had no alternative but to quit his job. In both instances the one and only reason for their unemployment was their religion and their ineligibility for benefits derived solely from practice of their religion.

In *Sherbert, supra,* the Court concluded that she was thus forced to make an impermissible choice between the precepts of her religion and unemployment. Petitioner, Eddie C. Thomas, was likewise faced with that exact un-

constitutional choice. As in *Sherbert,* the denial of benefits effectively penalizes Thomas' free exercise of religion guaranteed by the First Amendment and protected against state action by the Fourteenth Amendment. The fact that Sherbert "refused suitable work without good cause" and Thomas quit "without good cause in connection with the work" has no constitutional significance. These are but labels. The unmistakeable reality is that disqualification on either ground operates as a penalty for and deterrent to the exercise of First Amendment freedoms. *Sherbert, supra; Lincoln* v. *True,* 408 F.Supp. 22 (D.Ky. 1975); *Spence* v. *Bailey,* 465 F.2d 797 (6th Cir. 1972).

The Supreme Court of Indiana concluded that Eddie Thomas' First Amendment rights had not been abridged by the denial of unemployment benefits to him. According to the court, "it was unclear what Thomas' belief was and the basis for said belief." Pet. App. p. 37a; 391 N.E. 2d at 1133 (1979). The court also emphasized that Thomas was "not required by statute to violate a cardinal tenet of his religion." Pet. App. p. 38a; 391 N.E.2d at 1133 (1979). The court applied erroneous standards in determining whether petitioner's First Amendment rights had been violated and embarked on an impermissible and improper inquiry into the nature and basis of Thomas' religious beliefs.

Firstly, the findings and conclusions of the Appeals Referee (". . . claimant did quit due to his religious convictions," Pet. App. p. 3a) were adopted and affirmed by respondent Review Board ("he left his employment voluntarily because his religious beliefs as a Jehovah's Witness would not allow him to continue to work producing arms, after being transferred from his original

department which was not engaged in the manufacture of items used in the advancement of war." Pet. App. p. 5a). Under Indiana law, these determinations of fact are "conclusive and binding." Ind. Code 22-4-17-12 (Burns Code Ed. 1979 Supp.). The Indiana Supreme Court did not overrule these factual determinations and thus the issue of the application of the disqualifying provision of the Indiana law is directly raised. Even more important, under the First Amendment, governmental agents may make only limited inquiries into religious beliefs. "[I]t is no business of courts to say . . . what is a religious practice or activity. . ." *Fowler* v. *Rhode Island,* 345 U.S. 67, 70 (1953). *See* also *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696 (1976). Courts have consistently refrained from involving themselves in the type of inquiry about which the *Fowler* court warned them and in which the Indiana Supreme Court embarked in this case.

> [I]n such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight.

U.S. v. *Seeger* (1963) 380 U.S. 163, at 184. See also *Moskowitz* v. *Wilson,* 432 F.Supp. 947 (D.Conn. 1977); *Monroe* v. *Bombard,* 422 F.Supp. 211 (D.N.Y. 1976); *Geller* v. *Secretary of Defense,* 423 F.Supp. 16 (D.D.C. 1976); *Redmond* v. *Gaf Corp.,* 574 F.2d 897 (7th Cir. 1978); *Teterud* v. *Burns,* 522 F.2d 357 (8th Cir. 1975). In addition, it should be noted there has been no question raised as to the sincerity of Thomas' belief or bonafideness of the group to which he belongs.

There is, furthermore, no requirement that the religious practice be absolutely mandated in order to elevate peti-

tioner's claims to a level of constitutional significance. Again, it is not the province of the courts to dictate which practices or tenets are or are not required in a particular religion.

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.

United States v. *Ballard,* 322 U.S. 78, 87 (1944); see also *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* supra. As this court has noted:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia State Board of Education v. *Barnette,* 319 U.S. 624, 642 (1943).

Petitioner has indeed shown a clear violation of his First Amendment right to the free exercise of religion. Therefore, the decision of the Supreme Court of Indiana must be reversed.

II.

GRANTING UNEMPLOYMENT COMPENSATION BENEFITS TO PETITIONER DOES NOT AMOUNT TO AN UNCONSTITUTIONAL "ESTABLISHMENT OF RELIGION."

The Indiana Supreme Court held that granting unemployment compensation benefits to petitioner would violate the establishment clause of the First Amendment. Pet. App. p. 39a, ... Ind. ....., 391 N.E.2d at 1134 (1979). This ruling is directly contrary to decisions of this court and the values and purposes underlying the First Amendment.

This court has had numerous occasions to consider the underlying bases and the practical application of the religion clauses of the First Amendment, and has struggled to reconcile the often contradictory pulls of the two clauses. In *Walz* v. *Tax Commissioner of the City of New York,* 397 U.S. 664 (1970), Chief Justice Burger summarized the court's position with respect to the religion clauses as follows, at 669:

> The general principle deducible from the First Amendment and all that has been said by the court is this: That we will not tolerate either governmentally estabished religion or government interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

The present case is a dramatic example of such "benevolent neutrality" since no valid establishment clause concern is implicated by the provision of unemployment compensation benefits to petitioner.

This court has defined the major evils against which the Establishment Clause was intended to afford protection as "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Lemon* v. *Kurtzman* (1971) 403 U.S. 602 at 612. Each of these matters has likewise been subject to analysis and application, with the result that three general tests have evolved. First, is there a secular purpose? Second, is the principal or primary effect one that neither advances nor inhibits religion? Finally, is there excessive government entanglement with religion? *Lemon* v. *Kurtzman, supra* at 615. Indiana is here administering a general system of unemployment compensation, designed to protect its citizens against the "economic insecurity" of unemployment and to provide benefits "to persons unemployed through no fault of their own." Ind. Code 22-4-1-1 (Burns Code Ed, 1979 Supp.). As the Indiana Court of Appeals noted, Thomas' only "fault" in this matter was belief in the basic tenets of the Jehovah's Witnesses religion. Pet. App. p. 14a, 381 N.E.2d 888 (1978). The granting of unemployment compensation benefits here simply removes the economic sanction which has otherwise been imposed upon petitioner for exercise of his First Amendment rights. It reflects "nothing more than the governmental obligation of neutrality in the face of religious differences, and does not present that involvement of religious with secular institutions which it is the object of the establishment clause to forestall." *Sherbert* v. *Vener,* 374 U.S. 398, 410 (1963).

Concededly, Thomas' unemployment was a direct result of his religious views. Granting unemployment benefits in such a situation, however, does not threaten the separation of church and state, or "establish religion."

Rather, such action is a recognition that there are two clauses which concern religion in the First Amendment and some reconciliation of them is required. To deny unemployment benefits, in such a situation, unnecessarily penalizes petitioner's exercise of his religious rights and presents "a manifestation of . . . hostility (toward religion) at war with our national tradition that is embodied in the First Amendment guarantee of free exercise of religion." *McCollum* v. *Board of Education,* 333 U.S. 203, 211-212 (1948). The Indiana Supreme Court decision failed to "reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and teach religious ideas and practices is protected by the free exercise clause." *McDaniel* v. *Paty,* 435 U.S. 618 (1978), at 638. (Brennan, J., concurring). See *Everson* v. *Board of Education,* 330 U.S. 1 (1947); Gianella, *Religious Liberty, Non-Establishment, and Doctrinal Development,* Part II, 81 HARV. L. REV. 513 (1967). As the Court noted in exempting Amish children from a mandatory school attendance statute:

> (a) regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion. . . . The court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the establishment clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by this right of free exercise.

Wisconsin v. *Yoder,* 406 U.S. 205 (1972) at 220, 221.

CONCLUSION

For the above reasons petitioner respectfully submits that the decision of the Indiana Supreme Court is contrary to the First Amendment and precedents of this Court and must be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-952

EDDIE C. THOMAS,

Petitioner,

vs.

THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, WILLIAM H. SKINNER, J. FRANK HALEY and RALPH MILES, as members and constituting the Review Board of the Indiana Employment Security Division,

and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Respondents.

BRIEF OF RESPONDENT, THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION

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IN THE

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EDDIE C. THOMAS,

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THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, WILLIAM H. SKINNER, J. FRANK HALEY and RALPH MILES, as members and constituting the Review Board of the Indiana Employment Security Division, and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Respondents.

BRIEF OF RESPONDENT, THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION

QUESTIONS PRESENTED

Whether the State's denial of unemployment compensation benefits to petitioner constituted an impermissible burden on his free exercise of religious beliefs.

Whether an overriding public interest exists in regulating the expenditure of funds for unemployment compensation by means of the good cause regulation.

Whether the petitioner established good cause under the Indiana statute to qualify for unemployment benefits.

Whether the granting of benefits to the petitioner would amount to a violation of the Establishment Clause of the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Indiana Code § 22-4-1-1 (Burns 1974) reads as follows:

> As a guide to the interpretation and application of this act the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is declared hereby to be a serious menace to the health, morale and welfare of the people of this state and to the maintenance of public order within this state. Protection against this great hazard of our economic life can be provided in some measure by the required and systematic accumulation of funds during periods of employment to provide benefits to the unemployed during periods of unemployment and by encouragement of desirable stable employment. The enactment of this measure to provide for payment of benefits to persons unemployed through no fault of their own, to

faith as Jehovah's Witness, he gave no conditions attached to his employment and cited no specific religious tenets on the form.

On leaving Blaw-Knox, petitioner applied for unemployment compensation benefits, which were denied on December 11, 1975. Following a hearing, the referee found on February 24, 1976, that while Thomas had quit voluntarily as a result of religious convictions, such a basis for terminating employment did not constitute good cause connected with employment so as to allow the grant of benefits.

Thomas then initiated an appeal to the Review Board of the Employment Security Division on March 5, 1976. On November 29, 1976, the Review Board adopted the findings and conclusions of the referee and affirmed his decision.

An appeal was filed in the Indiana Court of Appeals, which on October 26, 1978, reversed the Board's decision. The Court of Appeals held that *Sherbert v. Verner* required a reversal of the Board. On November 22, 1978, the appellate court denied rehearing on the Board's petition.

The Indiana Supreme Court reversed the Court of Appeals' ruling on July 18, 1978. Following the previous "good cause" decisions in Indiana, the Court held that a termination must be job-related and objective in character to have been for good cause. In addition, the Court found that the indirect burden on Thomas' right of free exercise was supportable based on the State's secular goals, distinguishing the instant case from *Sherbert v. Verner,* 374 U.S. 410 (1963). It held that Thomas' personal beliefs were not forcibly violated by law and that he was not deprived of benefits granted to others. Finally, the Court cited the potential for violating the Establishment Clause should

> encourage stabilization in employment, and to provide for a state employment service is, therefore, essential to public welfare; and the same is declared to be a proper exercise of the police powers of the state.

Indiana Code § 22-4-15-1 (Burns 1974) reads as follows:

> With respect to benefit periods including extended benefit periods established subsequent to July 6, 1974, and before July 3, 1977, an individual who has voluntarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause shall be ineligible for waiting period or benefit rights for the week in which the disqualifying separation occurred and until he has subsequently earned remuneration in employment equal to or exceeding the weekly benefit amount of his claim in each of ten (10) weeks. The weeks of a disqualification period remaining at the expiration of an individual's benefit period will be carried forward to an extended benefit period or to the benefit of a subsequent claim only if the first week of such extended benefit period or subsequent benefit period falls within ten (10) consecutive weeks from the beginning of the disqualification period imposed on the prior claim.

STATEMENT OF THE CASE

Petitioner, Eddie C. Thomas, sought and obtained employment at Blaw-Knox Foundry and Machinery, Inc. in the roll foundry. After several months on that job, the company closed the roll foundry and transferred Thomas to the turret line where tank turrets were manufactured. Thomas requested a layoff, though not a transfer; when a layoff was denied, petitioner quit on November 6, 1975, asserting that he could not continue to work in that facility. Although his employment application listed his

Thomas' request be granted. The Court, on September 29, 1979, denied Thomas' request for rehearing.

Petition for a writ of certiorari was granted by this Court on February 19, 1980.

SUMMARY OF ARGUMENT

The State's denial of unemployment compensation benefits to petitioner does not prohibit or unreasonably burden petitioner's right to the free exercise of his religious beliefs. No absolute freedom to act based upon those beliefs exists, nor does an absolute right to such benefits. Thomas himself created the conflict between his employment and his personal beliefs, and he was not forced to violate a tenet of his faith.

A crucial and overriding public interest requires that the State's secular goals here be allowed to influence indirectly Thomas' conduct in exercise of his beliefs. There exists a strong interest in maintaining a stable level of employment, in encouraging productivity, in allowing business to determine independently what products it will produce, and in assuring neutrality toward both religion and nonreligion. Nor may the State infringe upon the Equal Protection rights of nonbelievers by granting benefits only to those whose personal beliefs are religious in nature.

The Indiana employment security act requires a claimant who voluntarily terminates employment to establish good cause in connection with the work. Good cause, under the statute, cannot be based upon reasons which are personal and not objectively related to the employment. The petitioner did not establish good cause; he presented only per-

sonal, subjective reasons for quitting and failed to show an objective nexus to his employment.

Granting unemployment benefits to the petitioner would amount to an unconstitutional violation of the Establishment Clause. To extend benefits to the petitioner, the Court will have to require a grant of benefits to religiously motivated pacifists while allowing a denial of benefits to nonreligious pacifists. Such an exemption is a violation of the neutrality provision of the "Establishment" clause of the First Amendment.

ARGUMENT

I.

The State's Denial of Unemployment Compensation Benefits to Petitioner Does Not Constitute an Impermissible and Direct Burden on His Free Exercise of Religious Beliefs.

Under the First Amendment to the United States Constitution, all individuals are granted protection against governmental entanglement in the holding of religious beliefs. It has long been held that government cannot constitutionally compel the espousing of a religious belief, *Torcaso v. Watkins,* 367 U.S. 488 (1961); nor can it discriminate against or among individuals or groups because of their religious beliefs. *Fowler v. Rhode Island,* 345 U.S. 67 (1963). Likewise, the government may not favor religion over nonreligion, *Epperson v. Arkansas,* 393 U.S. 97 (1968); *Buckley v. Valeo,* 424 U.S. 1, 92 (1975); *Everson v. Board of Education,* 330 U.S. 1 (1947).

However, not every governmental regulation, free of any claim of violation of the Establishment Clause, will

run afoul of the Free Exercise clause of the First Amendment. The freedom to act in accord with one's religious beliefs is not absolute and thus is not coextensive with the unlimited right to possess beliefs. *Braunfeld v. Brown,* 366 U.S. 599 (1961). Such conduct may be regulated if it poses some substantial threat to public order, peace or safety, or when the activities of one person based on religious belief collide with the liberties of others or the public or violate public policy. *Mohammad v. Sommers,* 238 F. Supp. 806 (D.C. Mich., 1964). If the means are reasonably adapted to the objective of achieving an important state goal and if there are no more narrow ways to achieve that end, a state regulation may restrain religious liberty in the public interest. *Monroe v. Bombard,* 422 F. Supp. 211 (D.C.N.Y., 1976); *Braunfeld v. Brown, supra.*

The petitioner herein, Eddie C. Thomas, sought employment at and was hired by Blaw-Knox to work in the roll foundry. The facts show that he never clearly indicated to his employer at the time of hiring that any special conditions attached to his employment but instead merely informed the company of his religious denomination without more specific information. Petitioner's Appendix (hereinafter Pet. App.) 27a. The referee determined that Thomas did not, knowing of his beliefs, seek out information as to Blaw-Knox to ascertain its armament-producing function before beginning his employment there. Pet. App. 3a. Thus, the employer was unaware at the time of Thomas' transfer that his new position would conflict with his religious beliefs. Thomas sought his original job at Blaw-Knox in spite of the fact that, as the record shows, the entire company was involved in the production of armaments. Pet. App. 33a. The personal problem created by his religious objection to contributing to the fur-

therance of war existed from the very first day of his employment and was completely a result of his voluntary act in joining the company and his own negligence in failing to seek information as to the nature of his employment.

This situation was completely unlike the one facing Adell Sherbert, a Seventh-Day Adventist. At the time she began working for the South Carolina textile mill, she was permitted to work a five-day week; considerably later, her employer changed all its shifts to require Saturday work. *Sherbert v. Verner,* 374 U.S. 398 (1963). She requested unemployment compensation benefits after being unable to locate a position which did not require Saturday work. However, her benefits were denied on the grounds that she had refused available work and thereby rendered herself ineligible. *Sherbert,* at 401. This Court held the denial of compensation benefits unconstitutional since Sherbert's constitutional right to exercise freely her religious beliefs was restricted by the compulsion to choose between benefits and her religious belief without a justifying and compelling state interest in regulating her conduct. *Id.,* at 404. That conclusion was reached in spite of the indirect nature of the burden upon her free exercise since the statute did not compel her to work on Saturdays and thus force her to abandon an essential tenet of her faith.

The subsequent case of *Lincoln v. True,* 408 F. Supp. 22 (D.C. Ken., 1975) relied on the *Sherbert* reasoning to require benefits be extended to a Jehovah's Witness who, after 21 years of work with a tobacco firm, was told by elders of her faith that her employment dealing with tobacco violated the Will of God and resigned her post. In both *Lincoln* and *Sherbert,* the Court's holdings rested on findings that the compulsion to choose between benefits and a religious belief was intolerable and unconstitutional.

In addition, both plaintiffs were involuntarily put in this unacceptable position of choice.

However, Thomas should have known when he began working at Blaw-Knox that the company was, as a whole, engaged in the production of armaments. Thomas did not attempt to obtain a transfer, Pet. App. 28a; the record does not indicate that he could not have found alternative employment either at the time of his hiring or at the time of his transfer. The record does not show that Thomas was faced with a choice between producing armaments or not working.

Sherbert cannot stand for the proposition that any action in exercise of a religious belief is permissible; in fact, *Sherbert* is limited to its facts. This Court, in that opinion, stated, at page 410:

> Finally, nothing we say today constrains the States to adopt any particular form or scheme of unemployment compensation. Our holding today is *only* that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. [Emphasis supplied.]

It is obvious that if Sherbert or Thomas or another person decided to exercise his religious beliefs by threatening to destroy or by destroying the machinery of the factory, such conduct would be subject to regulation and to criminal penalty. *Holdridge v. United States,* 282 F.2d 302 (8th Cir., 1960). Thus, while some methods of freely exercising one's beliefs are necessary and permissible, others are not and for the public good must be regulated.

A state provision allowing the use of churches as polling places for elections was upheld, despite the incidental burden on a voter who was barred by his religion from

entering churches of other faiths, in light of the state interest in having more available polling sites. *Berman v. Bd. of Elections, City of New York,* 420 F.2d 684 (2nd Cir., 1969), *cert. denied* 397 U.S. 1065. That circuit likewise found valid a congressional decision to prohibit deducting for income tax purposes money given to educational funds supporting religious schools. *Winters v. C.I.R.,* 468 F.2d 778 (2nd Cir., 1972). A public school teacher, a Jehovah's Witness, could be discharged for failure to adhere to the prescribed curriculum notwithstanding her claim that her right to free exercise was violated. *Palmer v. Bd. of Ed. of Chicago,* 603 F.2d 1271 (7th Cir., 1979), *cert. denied* 100 S.Ct. 689.

The Sixth Circuit has held that since the federal income tax is levied uniformly against both believers and those with no belief, it is a neutral statute and does not unreasonably burden the free exercise of religion by Quakers. *Graves v. C.I.R.,* 579 F.2d 392 (6th Cir., 1978), *cert. denied* 99 S.Ct. 1423. The requirement that persons must obtain advance permission before visiting for religious purposes an island used for naval target practice is not invalid under the free exercise clause. *United States v. Mowat,* 582 F.2d 1194 (9th Cir., 1978), *cert. denied* 99 S.Ct. 458. The ban on polygamy was upheld despite a Mormon's contention that it was his religious duty to continue that practice. *Reynolds v. United States,* 98 U.S. 145 (1878). A Jehovah's Witness may be compelled to submit to civilian work in lieu of induction into the military. *United States v. Berrier,* 434 F.2d 572 (4th Cir., 1970), *cert. denied* 401 U.S. 966; *United States v. Campbell,* 439 F.2d 1087 (9th Cir., 1971). In addition, the long line of Sunday closing law cases upholding such statutes despite their effect on

certain religious groups similarly demonstrate that free exercise is not unlimited.

All of those cases, including *Sherbert* and *Lincoln,* involve beliefs possessed by persons who, in acting upon those beliefs, were involuntarily made subject to regulation, loss of an economic benefit, or the imposition of a criminal sanction. None of the plaintiffs there could avoid the conflict of their own convictions with government policy. But Eddie Thomas might have done so—at no economic cost—by determining the nature of the employment at Blaw-Knox before he accepted a job there. He voluntarily sought a job at Blaw-Knox and assumed the risk created by his own negligence. *Sherbert* cannot be extended so far without severely limiting legislative ability to assure the general welfare. To do so would be to allow any individual to act as carelessly as Thomas did and would reduce resources available to assist those who are unemployed through no fault of their own. The state must keep from prohibiting religious acts by maintaining neutrality, but it is not to provide the means to carry out each and every religious act. *Clark v. Wolff,* 347 F.Supp. 887 (D.C. Neb., 1972), *aff'd. Anderson v. Wolff,* 468 F.2d 252 (8th Cir., 1972). Conscience is not always superordinating. *Gray v. Gulf, M. & O. R. Co.,* 429 F.2d 1064 (5th Cir., 1970), *cert. denied* 400 U.S. 1001.

Thus, it must be held on the facts here presented that any indirect burden on Thomas' free exercise rights resulted primarily and directly from his own lack of diligence. To elevate his voluntary and inadequately considered action to constitutional status is to violate the many decisions of our courts as to necessary restraint of liberties and to do damage to the two religious protections afforded by the First Amendment.

II.

An Overriding Public Interest Exists in Regulating the Expenditure of Funds for Unemployment Compensation by Means of the Good Cause Regulation.

Upon consideration of the facts of this case, it is overwhelmingly apparent that there exists a multifaceted, crucial and overriding public interest in the State's good cause-voluntary quit regulations which justifies any indirect burden these provisions may place on the exercise of religious beliefs. The states are first of all required to maintain neutrality toward religion and religious groups, neither overtly supporting a religion, favoring one religion over others or over nonreligion, nor inhibiting all religions. *Walz v. Tax Commission,* 397 U.S. 664 (1970); *Cantwell v. Connecticut,* 310 U.S. 296 (1940). The conduct or actions undertaken to express those beliefs, however, is subject to regulation where a substantial threat to public safety, peace or order exists, *Reynolds v. United States, supra,* or where the regulation does not infringe upon the free exercise of beliefs. *Sherbert, supra.*

Thomas was compelled as a result of his own actions, and not by law, to recognize the existence of conflict between his beliefs and company products. Nor did the statute by its terms require him to violate the religious objection to armament production which he expressed by resigning from Blaw-Knox. The Indiana provision imposed upon him the same requirements and conditions as it does upon every other person working then resigning in this State. In other words, any person who leaves his job for a personal reason or belief, not objectively measurable as job-related, faces the identical situation in his application for benefits. It has never been held that one who asserts a

violation of his freedom of travel, a protected right, or any other claimed right, is entitled to an exception to this statute, or that one who objects to some aspect of an industrial practice without the backing of a recognized religious denomination could be exempt from its terms.

To the contrary, the State may extend benefits from public funds where those funds are neutrally available to all. *Roemer v. Bd. of Public Works of Maryland,* 426 U.S. 736 (1976). No affirmative action by the state can be undertaken to treat religious groups differently from other groups. *Walz, supra.* As was pointed out by *Lemon v. Kurtzman,* the state has an interest in avoiding a religious entanglement to prevent potential political division along religious lines. 403 U.S. 602 (1971). Likewise, the state must act to protect the limited funds available for unemployment compensation, an interest growing daily along with the unemployment rate in these difficult economic times.

It does not benefit the state, the general public, or our economic development to encourage unrestricted voluntary unemployment. A stable work force decreases the expenses incurred by industry and increases the productivity of our nation. Employees are encouraged not only to work up to their potential, but to notify employers of special circumstances attendant upon their employment. Employers can thereby avoid speculative and possibly erroneous determinations as to the moral or religious beliefs of workers, and free communication of beliefs is facilitated. The morale of workers not sharing a particular belief is protected by the equal treatment of all. Nor should a group of workers or a religious group be allowed to influence the kind of goods produced by a given industry by refusing to pro-

duce some item; the danger of that eventuality as to armaments is great. Our economic and defensive security as a nation must be safeguarded, despite the counterbalancing need to assure the protection of beliefs. Since the number of persons potentially affected by the instant case is much greater than by *Sherbert,* great caution must be exercised.

Combined with these general factors are the dangers of violating not only the Establishment Clause, but also the Fourteenth Amendment's Equal Protection provisions, and the fact that there is no less restrictive method of achieving the state's goals. "The Free Exercise Clause categorically forbids government from regulating, prohibiting *or rewarding* religious beliefs as such." [Emphasis supplied] *McDaniel v. Paty,* 435 U.S. 618 (1978). The government may not give its stamp of approval to the spiritual content of beliefs or weigh alternative beliefs. *Allen v. Hickel,* 424 F.2d 944, 138 U.S. App. D.C. 31 (D.C. Cir., 1970), *on remand* 333 F.2d 1088; reversed on other grounds 495 F.2d 65, 161 U.S. App. D.C. 239. The state cannot benefit religious groups over nonreligious, nontheistic ones. *Kosydar v. Wolman,* 353 F.Supp. 744 (D.C. Ohio, 1972), *stay denied* 410 U.S. 903, *aff'd* 413 U.S. 901. Such an action by Indiana here might violate not just the Establishment Clause by giving financial support to a religious group or compelling a person to espouse a religious belief against his will to obtain the benefits, but also the Equal Protection clause. No reason exists to give a benefit, not a constitutional right, to one group and not grant a comparable benefit to others. *School District of Abington Twnshp. v. Schempp,* 374 U.S. 203 (1963); *McDaniel, supra.*

Sherbert and *Lincoln* apart, the doctrines of *Braunfeld*

v. Brown, supra, have continuing validity and force. If the purpose of a law is to impede or discriminate between religions, it is invalid. But if the law advances a secular purpose unable to be otherwise implemented, while placing an indirect burden on free exercise, it should be upheld in the public interest. The Indiana law in qustion here meets all the *Braunfeld* criteria as enumerated above and promotes the public welfare; it must be upheld as an all-or-nothing proposition: either a good cause provision may be applied to all to avoid gutting state unemployment programs, or such a provision must be stricken as to everyone, a fearsome and unpalatable prospect.

III.

The Petitioner Did Not Qualify For Unemployment Benefits Under the Indiana Statute Because He Failed to Establish "Good Cause" For Abandoning His Employment.

Under the provisions of the Indiana employment compensation act, as set forth in Indiana Code § 22-4-15-1 (Burns 1974), an individual who voluntarily quits his or her employment is disqualified from receiving benefits unless he or she can establish "good cause in connection with the work." Indiana courts have consistently construed such language to disqualify reasons which are personal to the employee and which are not objectively related to his or her employment as good cause. *Geckler v. Review Board of Indiana Employment Security Division,* 244 Ind. 473 (1963); *Lewis v. Review Board of Indiana Employment Security Division,* 152 Ind. App. 187 (1972).

The Indiana Court of Appeals, in *Gray v. Dobbs House, Inc.,* — Ind. App. —, 357 N.E.2d 900 (1976), adopted a two-pronged test to determine if an employee who voluntarily

quit employment did so with good cause. In *Gray, supra,* the Court held to avoid disqualification an employee who has voluntarily quit has the burden of establishing:

> (a) that his reasons for abandoning his employment were such as would impel a reasonably prudent man to terminate under the same or similar circumstances; and (b) that these reasons, or causes, are objectively related to the employment. 357 N.E. 2d at 903.

The petitioner did not meet this burden; he presented only personal, subjective reasons and failed to show an objective nexus with his employment. Blaw-Knox produced armaments when the petitioner sought employment, but he did not inquire into the nature of its products. Pet. App. pp. 3a, 8a. The roll foundry in which he was initially placed was involved with the production of weapons though it was not as highly discernible because it was involved in a much earlier stage of production than the turret line. Pet. App. p. 33a. The petitioner stated he did not mind working in an industry involved in producing items which could be used for the advancement of war if he was involved at an early point of production where it was not as readily apparent that weapons were being produced, and he indicated a willingness to return to work in the roll foundry if it was reopened by requesting a layoff. Pet. App. pp. 3a, 34a. The petitioner's reason for quitting was that it bothered him to work at the turret line because it was involved with a later stage of production where it was more easily discernible that his employer produced armaments. Pet. App. p. 34a. Furthermore, as the Indiana Supreme Court noted in its opinion, other Jehovah's Witnesses who worked at Blaw-Knox did not feel impelled to quit when in the same position as the petitioner. 391 N.E.2d, at 1133.

IV.

Granting Petitioner Benefits Would Amount to an Unconstitutional Violation of the Establishment Clause of the First Amendment.

The First Amendment forbids government from establishing religion and from prohibiting free exercise of religion. These two mandates compel neutrality on the part of state and federal government so that there will not be a fusion of governmental and religious functions and, thereby prevent the creation of a state church or a church-dominated state. *School District of Abington v. Schempp and Murray, supra; Walz v. Tax Commissioner of the City of New York, supra.* The effect of both clauses should be to ensure that religious activity remains entirely private. *Everson v. Board of Education of the Township of Ewing, supra, School District of Abington v. Schempp and Murray, supra.*

To grant benefits to the petitioner here, by judicial intervention, on the basis of protecting his rights under the Free Exercise Clause of the First Amendment would violate the Establishment Clause of the same amendment.* Unless the Court were to strike down the disqualification statute, Indiana Code § 22-4-15-1 (Burns 1974), it will have to create an exemption, based on religious belief, to the statute's provisions in order to extend benefits to the petitioner. However, such an exemption would, by its very nature, be unconstitutional. *United States v. Seeger,* 380 U.S. 163 (1965); *United States v. Welsh,* 398 U.S. 333 (1970). This Court held in *Seeger* and *Welsh,* that to limit

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* See Ely, "Legislative and Administrative Motivation in Constitutional Law," 79 Yale L.J. 1207 (1970).

Weiss, "Privilege, Posture and Protection: Religion in the Law," 73 Yale L.Jr. 593 (1964).

the classification of an exemption to religious grounds is an unconstitutional violation of the Establishment Clause of the First Amendment. Justice Harlan, in his concurring opinion in *United States v. Welsh, supra,* wrote:

> Since this created a religious benefit not accorded to petitioner, it is clear to me that this conviction must be reversed under the Establishment Clause of the First Amendment unless Welsh is to go remediless.

United States v. Welsh, 398 U.S. 333, at 362 (1970).

The Free Exercise Clause does not have priority over the Establishment Clause. *McGowan v. Maryland,* 366 U.S. 420 (1961); *School District of Abington v. Schempp and Murray, supra.* To give superiority to the Free Exercise Clause violates the First Amendment's requirement of neutrality, as this Court has stated:

> The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at that first experiment on our liberties.

School District of Abington v. Schempp and Murray, 374 U.S. 203, at 225 (1963).

The mere fact that a law may have an impact on religious observance should not trigger judicial intervention. Such a broad position would foster excessive governmental entanglement with religion, since every piece of legislation could have a possible impact on some religious observance. *Walz v. Tax Commission of the City of New York, supra.* Rather, the purpose of the law should be examined, where, as here, the law favors neither religion nor non-religion and serves a legitimate government interest, the Court should not intervene. *Braunfeld v. Brown, supra; Graves v. C.I.R., supra.*

The Supreme Court of Indiana was correct in holding that extension of benefits to the petitioner, by creating a special religious exemption to the Indiana "good cause" statute, would have violated the Establishment Clause of the First Amendment. Therefore, its decision should be affirmed.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Indiana should be affirmed.

Respectfully submitted,

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No. 79-952

In the

Supreme Court of the United States

OCTOBER TERM, 1980

EDDIE C. THOMAS,

Petitioner,

vs.

REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, WILLIAM H. SKINNER, J. FRANK HALEY, and RALPH MILES, as members and as constituting the Review Board of the Indiana Employment Security Division.

and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Respondents.

On Writ of Certiorari to
The Supreme Court of Indiana.

REPLY BRIEF

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Respondents.

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REPLY BRIEF

ARGUMENT

I. INTRODUCTION

This case is controlled by *Sherbert* v. *Verner,* 374 U.S. 398 (1963), which the respondent Review Board of the

Indiana Employment Security Division (hereinafter referred to as Review Board) has failed to distinguish. Mr. Thomas has shown that the denial of unemployment compensation benefits to him constitutes an impermissible burden on his First Amendment right to the free exercise of religion. The Review Board claims that there is no direct burden on petitioner's First Amendment rights, but does not deny indirect infringement. However, it attributes this indirect infringement to Thomas' lack of diligence.

Until now the respondent has conceded having no compelling state interest to justify such infringement. Even its belated claims of a compelling state interest, improperly raised for the first time before this Court, would not override petitioner's legitimate claim to the free exercise of religion. Thus, respondent has failed to meet the test advanced by this Court in *Sherbert, supra,* and the decision of the Supreme Court of Indiana should be reversed.

II. THE RESPONDENT REVIEW BOARD HAS FAILED TO DISTINGUISH PETITIONER'S CASE FROM SHERBERT V. VERNER.

In its effort to show that the denial of unemployment compensation to Eddie C. Thomas did not burden his right to the free exercise of religion, therefore making this case distinguishable from *Sherbert* v. *Verner, supra,* the Review Board has made certain representations in its brief which are contrary to the factual record established in this case. The Review Board relies on these misrepresentations to persuade this Court to find that any indirect burden on Thomas' free exercise rights resulted from his own lack of diligence. The review of the record set forth will show that such conclusion cannot be reached in this case.

At p. 3 of Respondent's Brief (hereinafter referred to as "Resp.Br.") the Review Board states: "Thomas requested a lay off, though not a transfer; when a lay off was denied, petitioner quit on November 6, 1975, asserting that he could not continue to work in that facility." *See also,* Resp.Br. p. 9. In the Findings and Conclusions of the Referee's decision of February 24, 1976, it is stated:

> "Claimant continually searched for a transfer to another department which would not be so armament related; however, this did not materialize, and prior to the date of his leaving, claimant requested a lay-off which was denied; and on November 6, 1975, claimant did quit due to his religious convictions".

Petitioner's Appendix p. 2a, contained in the Petition for Certiorari, and hereinatfer referred to as "Pet.App.".

The Review Board claims that: "Thomas sought his original job at Blaw-Knox in spite of the fact that, as the record shows, the entire company was involved in the production of armaments". Resp. Br. p. 7. This assertion has no support in the Statement of Facts of the Review Board's decision of November 29, 1976, where the respondent concluded:

> ". . . [H]e left his employment voluntarily because his religious beliefs as a Jehovah Witness [sic] would not allow him to continue to work producing arms after being transferred from his original department which was not engaged in the manufacture of items used in the advancement of war."

Pet. App. 5a. Thus, the roll foundry, for which Thomas was especially hired, was not involved in the production of armaments.

The Review Board alleges that the personal problems created by Thomas' religious objection to contributing to the furtherance of war existed from the very first day of his employment, and that any burden on his First Amendment rights resulted from his negligence in failing to seek information as to the nature of his employment. Resp. Br. p. 7-8. The record again proves respondent's allegations incorrect. The referee concluded:

> "The evidence reveals that approximate [sic] two to three weeks prior to the claimant's date of leaving, the "Roll Foundry" was closed permanently and claimant was transferred to the terret [sic] line. Claimant, at this time, real [sic] realized that all of the other functions at the Blaw-Knox Company were engaged in producing arms for the Armament Industry".

Pet. App. 2a. Thus, during his first year of employment at Blaw-Knox, petitioner's job was not in conflict with his religious beliefs.

Under Indiana law, these determinations of fact are "conclusive and binding", Ind. Code 22-4-17-12 (Burns Code Ed. 1979 Supp.), and an Appellate Court may reverse them only if reasonable men would be bound to reach a different conclusion. *Skirvin* v. *Review Board,* 355 N.E. 2d 425 (Ind. App. Ct. 1976); *McKinley* v. *Review Board,* 290 N.E. 2d 108 (Ind. App. Ct. 1972) *aff'd,* 301 N.E. 2d 845 (Ind. S.Ct. 1973), *cert denied* 415 U.S. 985; *Youngstown Sheet and Tube Co.* v. *Review Board of Indiana Employment Security Division,* 116 N.E. 2d 650 (Ind. App. Ct. 1954). In this case, these findings were affirmed by the Supreme Court of Indiana. Pet. App. 35a.

The Review Board attempts to distinguish petitioner's case from both *Sherbert* and *Lincoln* v. *True,* 408 F.

Supp. 22 (W.D.Ky. 1975), by indicating that the plaintiffs in both cases were "involuntarily put in this unacceptable position of choice", whereas "Thomas should have known when he started working at Blaw-Knox that the company was, as a whole, engaged in the production of armaments". Resp. Br. p. 9. It has been shown that Thomas did not realize the armament-producing nature of Blaw-Knox until after his involuntary transfer to the turret line. Thomas did not create the conflict between his employment and his religious beliefs; he had no control over the circumstances that ultimately led to his transfer to the turret line. Similarly, Adell Sherbert had no control over her employer's decision to change all shifts to a six day work week, including her Sabbath which fell on Saturday. Moreover, Ethel Lincoln felt bound to accept the decision of the elders of the Jehovah's Witnesses congregation that her continued employment in the manufacture of tobacco was against the will of God, even though she had been employed in the tobacco industry for 21 years. As in the instant case, the only reason Sherbert and Lincoln were unemployed was because of their religious beliefs, and their ineligibility for benefits derived solely from the practice of their religion. The pressure upon them to forego that practice is unmistakable. They are forced to choose between the precepts of religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of religion in order to accept work, on the other hand. *Sherbert, supra,* at 404. Because Thomas was also faced with this impermissible choice, *Sherbert* and *Lincoln* control this case and in accordance with the holdings therein, the decision of the Supreme Court of Indiana should be reversed.

III. HAVING CONCEDED THE LACK OF A COMPELLING STATE INTEREST IN THE STATE COURTS, THE REVIEW BOARD CANNOT NOW RAISE THIS ISSUE BEFORE THIS COURT.

The First Amendment to the United States Constitution declares that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. This fundamental right is protected from state infringement by the Fourteenth Amendment. *NAACP* v. *Button,* 371 U.S. 415 (1963); *Bates* v. *Little Rock,* 361 U.S. 516 (1960); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940). First Amendment freedoms are susceptible of restrictions only to prevent grave and immediate danger to interests which the state may lawfully protect. *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 639 (1943). Thus, if the challenged state action is to withstand constitutional challenge

> "it must be either because her disqualification as a beneficiary represents no infringement by the state of her constitutional rights of free exercise, or because an incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the state's constitutional power to regulate'. . . ."

Sherbert v. *Verner,* 374 U.S. 398, 403 (1963). *See also, generally, Speiser* v. *Randall,* 357 U.S. 513 (1958).

The respondent Review Board has attempted, for the first time in these proceedings, to advance a compelling state interest. This position of the Review Board is not only unsupported by the record of the proceedings below, but it is in direct conflict with the same.

In appealing the decision of the Review Board to the Indiana Court of Appeals, the petitioner argued that the denial of unemployment compensation benefits to him

constituted an impermissible burden on his First Amendment right to the free exercise of religion. The Review Board's argument focused on the good cause requirement in cases of voluntary termination, and on alleged differences that made *Sherbert* distinguishable from the instant case. No compelling state interest was raised in the Review Board's brief on the merits. In oral argument, the Board, in fact, conceded that should the Court find a burden on Thomas' First Amendment rights, no compelling state interest could be offered in justification. Pet. App. p. 13a.

On transfer to the Supreme Court of Indiana, the Review Board again failed to advance a compelling state interest which would override Thomas' right to the free exercise of religion. In urging reversal of the Court of Appeals, the Review Board alleged, *inter alia,* that the decision ". . . should be reversed because it erroneously decides a new question of law, to wit: whether an employee who voluntarily quits his employment because such employment conflicts with his religious beliefs is ineligible for unemployment compensation benefits for having voluntarily left his employment without good cause in connection with the work." (No. 2-1276 A 491 Ind. S. Ct., Petition for Transfer, p. 1) The brief in support of this petition was again silent on the issue of a compelling state interest. The Supreme Court of Indiana embarked on an impermissible and improper inquiry into the nature and basis of Thomas' religious beliefs, and concluded that his First Amendment rights had not been abridged by the denial of unemployment benefits to him. Thus, no compelling state interest was raised or briefed, and none was considered by the State Court. Pet. App. p. 26a-49a.

Finally, in its brief in opposition to the Petition for a Writ of Certiorari to the Supreme Court of Indiana, the

respondent Review Board again failed to assert a state interest to override Thomas' legitimate claim to the free exercise of religion. This Court has consistently held that it will not decide issues raised for the first time before it, which were never raised, preserved or passed upon in the state court below. *Tacon* v. *Arizona,* 410 U.S. 351, 353 (1973); *Ramsey* v. *United Mine Workers of America,* 401 U.S. 302, 312 (1971); *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969). The questions which the Court will consider must properly arise in the record, *Tyrrell* v. *District of Columbia,* 243 U.S. 1 (1914), and must have been argued and briefed below, *California* v. *Taylor,* 353 U.S. 553, 557, n.2 (1957) *See also, Youakim* v. *Miller,* 425 U.S. 231 (1976). *Singleton* v. *Wulff,* 428 U.S. 106 (1976); *Adickes* v. *Kess & Co.,* 398 U.S. 144, 147, n.2 (1970). The same result has also been reached where a point was raised in the Court of Appeals but not discussed in that court's opinion. *N.L.R.B.* v. *Sears, Roebuck, & Co.,* 421 U.S. 132, 163-164 (1975). Similarly, a party cannot raise a new theory on appeal that was not presented to the court below, *Capps* v. *Humble Oils & Refining Co.,* 536 F. 2d 80 (5th Cir. 1976), and an Appellate Court will not decide a case on a legal theory directly contrary to that advanced in the lower court. *Alexander* v. *Town & Country Estates, Inc.,* 535 F. 2d 1081 (8th Cir. 1976) *See also, Kassman* v. *American University,* 546 F. 2d 1029 (D.C. Cir. 1976); *Browzin* v. *Catholic University of America,* 527 F. 2d 843, 849 n.2 (D.C. Cir. 1975).

This Court faced a similar situation in *Sherbert* when the South Carolina Employment Security Commission attempted to introduce additional grounds to justify the impermissible burden on appellant's First Amendment rights. In rejecting the claim that granting unemploy-

ment benefits to Adell Sherbert would not only inspire the filing of claims by unscrupulous persons feigning objections to Saturday work, but also dilute the unemployment compensation fund, the Court stated:

> "[T]hat possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court."

Sherbert, supra, at 407. The Court, however, also held:

> "Nor, if the contention had been made below would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, *United States* v. *Ballard,* 322 U.S. 78, 64 S.C. 822, 88 L. Ed. 1148 — a question as to which we intimate no view since it is not before us — it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." (citations omitted).

Id., at 407.

The Review Board now alleges the existence of an overriding public interest in regulating the expenditure of funds for unemployment compensation by means of the good cause regulation. "It is basic that no showing merely of a rational relationship to some colorable state

interest would suffice; in this highly sensitive constitutional area, only the greatest abuses, endangering paramount interests, give occasion for permissible limitations." *Sherbert* v. *Verner, supra,* at 406, citing *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945). As noted above, the *Sherbert* Court concluded that prevention of the filing of spurious claims was not sufficient to justify the burden cast on Adell Sherbert's First Amendment rights.

The Review Board further urges this Court to consider the dangers of violating the Establishment Clause, the Equal Protection provisions of the Fourteenth Amendment, and the fact that there is no less restrictive method of achieving the state's goals. Resp. Br. p. 14. The *Sherbert* Court clearly indicated that extension of unemployment benefits to the appellant therein did not foster the establishment of the Seventh-Day Adventist religion in South Carolina. *Sherbert, supra,* at 409. A similar concern was before this court in *Wisconsin* v. *Yoder,* 406 U.S. 205, 221 (1972) and then this Court said:

> "The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the establishment clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses
>
> > 'we have been able to chart a course that preserves the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed'. *Walz* v. *Tax Commission, supra,* at 672, 90 S. Ct. at 1413."

Thus, extending unemployment compensation benefits to the petitioner in this case will again preserve doctrinal flexibility in approaching the inherent conflict between the Religion Clauses of the First Amendment. Such flexibility is not possible under the "all or nothing" approach suggested by the respondent. Resp. Br. p. 15.

The remaining two claims raised by the Review Board—possible violations of the Equal Protection provision of the Fourteenth Amendment and no less restrictive way of achieving the state's secular goals—are totally unsupported by the record and have been raised now for the first time in these proceedings. For the reasons advanced previously in this section, the same should not be considered by this Court. Moreover, this Court was aware of such arguments in *Sherbert* and did not find them persuasive. *Sherbert* v. *Verner,* 374 U.S. 398, 422 (1963) (Harlan, J., dissenting). Even assuming, *arguendo,* that its recently found compelling state interest argument were to be considered by this Court, the Review Board has failed to make an adequate showing that said interest overrides the petitioner's right to the free exercise of religion and that there is no alternative form of regulation that will adequately protect the state interest. *McDaniel* v. *Patty,* 435 U.S. 618, 628 (1978); *Wisconsin* v. *Yoder,* supra, at 215, *Sherbert, supra,* at 408.

In his brief on the merits, the Petitioner has already addressed himself to the inhibitory effects of the application of the disqualifying provisions of the Indiana Employment Security Act, Indiana Code 22-4-15-1, (Burns Code Ed. 1974), on his right to the free exercise of religion. *See,* Brief for Petitioner, pp. 10-18. In light of the concession of the Review Board that it has no compelling state interest to justify the infringement of

Thomas' First Amendment rights, and because its belated claims do not override petitioner's right to the free exercise of religion, the decision of the Supreme Court of Indiana should be reversed.

IV. THE APPLICATION OF THE INDIANA STATUTE EXCLUDING RELIGIOUS REASONS AS "GOOD CAUSE" FOR TERMINATION OF EMPLOYMENT VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The Respondent Review Board argues that Thomas voluntarily left his employment without "good cause" since his reasons for leaving were personal and not objectively related to the employment. Resp. Br. 15-16. The opinion of the majority of the Indiana Supreme Court is similar. Pet. App. p. 32a. The Supreme Court of South Carolina affirmed the denial of unemployment compensation benefits to Ms. Sherbert on nearly identical grounds in *Sherbert* v. *Verner,* 240 S.C. 286, 125 S.E. 2d 745 (1962); however, these reasons were rejected by this Court on appeal.

All that is required of petitioner Thomas is that he show that the denial of unemployment benefits to him has a "coercive effect" on the practice of his religion. *Abington School District* v. *Schempp.* 374 U.S. 203, 223 (1963). Once this is shown, the Review Board must prove both that a compelling state interest justifies the regulation and that there exist no less restrictive means to enforce the state's interest. *Wisconsin* v. *Yoder,* 406 U.S. 205, 215 (1972).

The coercive effect of the disqualifying provisions of the Indiana Employment Security Act, Indiana Code § 22-4-15-1 (Burns Code Ed. 1974), on petitioner's free

exercise rights is the same as that recognized in *Sherbert* v. *Verner,* 374 U.S. 398, 403 (1963). The application of I.C. § 22-4-15-1 to find no "good cause" in circumstances where a religious belief causes the severance of employment forces persons to choose between following the precepts of their religion and forfeiting benefits, or abandoning their religion in order to remain employed. This coercive choice violates the free exercise clause regardless of whether one was fired by an employer for refusal to work, as Sherbert was, or whether one quits work as Thomas did.[1] *Sherbert* requires the State to treat the religious convictions in both instances as "good cause," particularly since no compelling state interest has been offered by respondent, as previously discussed in argument III of this brief.

The Review Board challenges the sincerity of Thomas' religious belief. It argues that Blaw-Knox produced armaments when petitioner sought employment and it criticizes petitioner for having no religious objection to working in the roll foundry where petitioner was not involved in the direct fabrication of tanks, but instead was involved at a much earlier stage of production where the raw product was being developed. Resp. Br. 16. The facts with regard to these contentions are clear. When Thomas began work at Blaw-Knox he did not know the company was involved in the production of armaments. Pet. App. p. 2a-3a. Indeed, Thomas did not realize this

[1] In passing, this Court noted one author's observations that strongly held religious convictions are so impelling as to constitute good cause for refusal. Altman, *Availability for Work: A Study in unemployment Compensation* (1950), 187. *Sherbert* v. *Verner,* 374 U.S. 398, 407 n.7 (1963).

until he was transferred to a position on the tank turrent line, Pet. App. p. 2a, and prior to the transfer he was not engaged in the production of armaments. Pet. App. 1a-5a.

The fact that Thomas' religious beliefs permitted him to work at an early stage of the production as opposed to participating in the manufacture of a tank turret is a belief that is protected by the First Amendment. This is true even though Thomas' conviction may be an individual belief, not adopted by, but consistent with the view of his sect. What was stated recently in *Lewis* v. *Califano,* 616 F. 2d 73, 79 (3rd Cir. 1980) is applicable here:

> The First Amendment was designed in large part to protect freedom of conscience. Note, "Toward a Constitutional Definition of Religion," 91 Harv. L. Rev. 1056, 1058 (1979). To fulfill this goal adequately, the Amendment may be read to accomodate the conscience of each individual. Merel, "The Protection of Individual Understanding of Religion Under the First Amendment," 45 Chicago L. Rev. 805 (1978). Like the rest of the First Amendment, the free exercise clause should be sensitive to the conscience of individuals.

An individual interpretation of and adherence to the teachings of the Bible is in agreement with the beliefs of Jehovah's Witnesses, as explained in the following passage from one of their publications:

> In many areas of life, including employment, we must allow our conscience, enlightened by God's Word and his spirit, to guide us. Another member of the Christian congregation may have no qualms of conscience about the propriety of a certain type of employment. But our own conscience may cause us to have doubts. Should we ignore these doubts

> and let the other person's conscience decide for us? The apostle Paul provides the inspired answer in his discussion concerning the eating of meat, saying: "If he has doubts, he is already condemned if he eats, because he does not eat out of faith. Indeed, everything that is not out of faith is sin." (Rom. 14:23) Thus, when a person feels ill at ease about certain work and cannot justify it in his own conscience, he acts wisely to make a change. He thereby avoids sinning in the sense of going against his conscience, wounding it. At the same time, one's uncertainty and "inward questionings" about the rightness of certain work should not cause him to become critical of others, making an issue of matters unnecessarily or judging them as violators of God's law when there is no clear Scriptural evidence to that effect.

"Doing Work With a Good Conscience Before God and Men", *Our Kingdom Service,* September 1976, pp. 5-6. Thus, Thomas was compelled to follow the dictates of his conscience. The fact that other Jehovah's Witnesses remained employed at Blaw-Knox in no way diminishes or taints petitioner's legitimate claim to the free exercise of religion. The application of the Indiana Statute to Thomas' situation violates the free exercise clause of the First Amendment.

CONCLUSION

For the above reasons petitioner respectfully submits that the decision of the Indiana Supreme Court is contrary to the First Amendment and precedents of this Court and must be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-952

EDDIE C. THOMAS,

Petitioner,

—v.—

THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE AND BRIEF, *AMICUS CURIAE*

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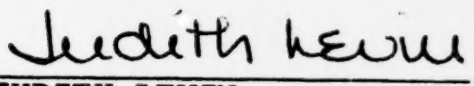
The American Civil Liberties Union respectfully moves, pursuant to the Court's Rules, for leave to file the within brief amicus curiae. Counsel for the Petitioner has consented to the filing of this brief; counsel for the Respondents has refused consent.

The ACLU is a nationwide, non-partisan organization of over 200,000 members, dedicated to preserving and protecting the civil liberties guaranteed by the Constitution and the Bill of Rights. Like others who have studied the Religion Clauses of the First Amendment, we have been forced to confront the competing and conflicting claims of Free Exercise and Non-establishment, and our efforts to resolve those claims have led to experience which we believe can assist the Court.

Against the arguments of those who argue that neutral, non-discriminatory legislation infringing the Free Exercise of religious belief is constitutional, the ACLU has long concluded that such infringement is barred by the First Amendment absent compelling governmental necessity. We successfully pressed that argument upon the Court as counsel for petitioner in Jones v. Opelika, 319 U.S. 103 (1943) in a tax context, and as amicus curiae in Sherbert v. Verner, 374 U.S. 398 (1963), in the unemployment compensation context present here.

Succeeding years have produced no reason for the ACLU to retreat from its positions in those cases, or for the Court to reverse those vital decisions. We submit this brief amicus curiae to urge the Court to reaffirm the constitutional commitment to the spirit of toleration for religious practice that the First Amendment was enacted to foster and protect.

Respectfully submitted,



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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AMICUS CURIAE

Interest of Amicus

The interest of the Amicus appears in the foregoing motion.

QUESTIONS PRESENTED

This case presents two difficult questions of constitutional law and principle, both of which depend, for their resolution, upon the interpretation of Sherbert v. Verner, 374 U.S. 398, (1963) still the landmark decision on the duty of the states to accommodate the free exercise interests of their citizens and residents:

First, does Sherbert apply to the case at hand? Has Indiana, that is to say, a constitutional duty, under its unemployment compensation scheme, to treat the petitioner's religiously motivated refusal to continue his employment in the production of war material as tantamount to involuntary dismissal? Sherbert held that South Carolina had such an obligation in the case of a Saturday Sabbatarian who refused to make herself available for Saturday work.

Second, assuming its applicability, is Sherbert's holding that there is such a duty of accommodation defensible in the face of criticism a) that the imposition of that duty violates the Establishment Clause by favoring religion over non-religion and b) that in any case Sherbert goes further,

in finding a duty to accommodate, than the principle of free exercise would seem to require?

ARGUMENT

I. SHERBERT v. VERNER CONTROLS THIS CASE IN ALL ESSENTIALS OF FACT, LAW AND CONSTITUTIONAL PRINCIPLE

A. Facts

In its opinion, the Indiana Supreme Court observes "that there are significant differences between Thomas' situation and that involved in Sherbert." See Appendix at 35A. We disagree.

The Indiana Court incorrectly argues, at 37a, that petitioner's "dilemma does not equal a violation of the kind of cardinal religious tenets at stake in Sherbert, involving work on one's Sabbath and the pressure to violate religious precepts or not to work at all."

It is inappropriate for courts to determine which concededly religious tenets are "cardinal" or more central to exercise of religious belief than others. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). In any event, petitioner's beliefs are of an importance that is constitutionally indistinguishable from Sherbert's.

Like Sherbert, petitioner is a member of a millennial Christian Protestant sect that gives primacy to individual conscience informed by scriptural interpretation. As a Jehovah's Witness, petitioner must look to his own "Bible-trained conscience" for an absolute rule of conduct.

By a stubborn and insistent tradition that has brought them into this and other courts with some frequency, Jehovah's Witnesses "pursue peace with all men." 1/ As a group, they consistently eschew military or political commitments that compromise, or even appear to compromise, their loyalty to a coming divine order.

1/ This Court has examined the religious claims of Jehovah's Witnesses in a long series of cases where state regulations conflicted with the free exercise of religious belief. See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940); Jones v. Opelika, 316 U.S. 584 (1942), reversed 319 U.S. 103 (1943); Martin v. Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Follett v. McCormick, 321 U.S. 573 (1944); Niemetko v. Maryland, 340 U.S. 268 (1951); Fowler v. Rhode Island, 345 U.S. 67 (1953). In each of these cases, this Court reversed the decision of the highest state courts on the ground that state action had disadvantaged the appellants because of their religious beliefs.

They do not call it pacifism but in secular terms it comes to nothing less. "For the weapons of our warfare are not fleshly..." See under "war", Watchtower Bible and Tract Society, Make Sure of All Things (1965). Thus many Jehovah's Witnesses, during the Second World War, refused not only military service but alternative service as well - even in civilian institutions. See Beckford, The Trumpet of Prophecy: A Sociological Study of the Jehovah's Witnesses, 22-38 (1975).

Non-participation in war and war-related activities is, in short, a "cardinal" tenet of petitioner's religious faith. His co-religionists counseled him to apply this doctrine to his work once transferred to the turret line, and, consulting his own faith and belief, he did so.

Although Indiana purports to find the distinction between a general foundry and a tank assembly line over-subtle and confused in the context of a largely or even exclusively war-related manufacturing plant, the state's own assessment of the logic

of petitioner's beliefs is irrelevant. [2] What is crucial is that the belief according to which petitioner acted was religious, Pet. 35a and further that petitioner made clear to his employers and others who needed to know his willingness and availability for work.

In this case the petitioner has contended from the time of transfer that a return to the foundry - now partially

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2/ Any notion that the petitioner was frightened by his work - and so asked for a transfer out of fear rather than scruple - seems to us to misconstrue his comments at Petition for Certiorari at 34a [hereinafter cited as "Pet. 34a"], on bomb scares and the like, which, in his words "really imprinted on my mind exactly where I was working..." The Review Board itself, and the referee, made no such mistake, finding as a fact - a finding left intact by every court below - that Thomas left work for religious reasons. See Pet. 35a. The simple fact that another Jehovah's Witness accepted the work petitioner refused proves, at most, the highly individualized nature of Jehovah's Witness Christianity.

closed - would be acceptable to him. Assuming, as we must, that Blaw-Knox could not transfer him back, he had no choice but to resign either his employment or his convictions.

Sherbert held herself out as available for work on any day of the week but Saturday. The petitioner here holds himself out as available for work on any production line not engaged directly in the manufacture of weapons. The respective conscientious reservations are closely analogous in at least three respects: first, they conform to a reasonable standard of general availability for work; second, they conform to the requirements of the original employment in question; and, third, while they occasion an election between religious observance and job performance, they do so through no change in the employee's preferences or convictions - but solely through changes in the requirements of the respective employers.

B. Law

Indiana's scheme of unemployment compensation disqualifies as ineligible, among others, those insured and unemployed persons who "voluntarily [left] employment without good cause in connection with work...." Ind. Code §22-4-15-1. Both the referee and the Review Board itself found that the petitioner left "due to his religious convictions" but "without good cause in connection with the work...." See Pet. 9a.

The South Carolina scheme in Sherbert similarly disqualified as ineligible, among others, those insured and unemployed persons who have "failed without good cause... to accept available suitable work when offered...by the employment officer or employer...." S.C.S., Tit. 68, §68-114-3-a-ii. The South Carolina Employment Security Commission found that, despite her religious objection to Saturday work, Sherbert had, in fact, failed without good cause to accept "suitable work when offered...." See Sherbert v. Verner, 374 U.S. 398, at 401.

Indiana decisions in this area, while emphasizing "liberal" construction of the

statute, Massengale v. Review Board, 132 Ind. App. 587, 178 N.E. 2d 557 (1961), similarly insisted that "good cause," in cases of "voluntary" termination, must be "objective" and not "subjective," must arise, that is, from the employment situation itself. Geckler v. Review Board of the Indiana Employment Service Division, 244 Ind. 473, 193 N.E.2d 357 (1963).[3/] South Carolina's decisions, prior to and including Sherbert, put essentially the same point in terms of "personal reasons" for employment termination. In both cases, the unemployed workers insisted on a constitutional obligation in the State to treat

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3/ Thus, the decision below cannot be defended on the ground that Indiana accepts Sherbert, and permits religiously-based "good cause" for quitting, but that petitioner simply failed properly to bring himself within the exception. The Indiana Supreme Court expressly relied on the ground that Sherbert did not apply "to those who voluntarily [sic] quit work". Pet. 31a. The Court held that "good cause which justifies voluntary termination must be job-related and objective in character." Pet. 29a.

religious conviction, albeit subjective or personal, as "good cause." Sherbert upheld that claim.

In purpose, in terms, and in administration, then, the two statutory schemes in question would seem virtually indistinguishable. Both seek to alleviate the economic difficulties of "persons unemployed through no fault of their own." Ind. Code §22-4-1-1. In the interests of economies of administration and cost both disqualify - as voluntary, personal, and without good cause - religiously compelled unemployment. Both fall under the same constitutional principle.

C. Constitutional Principle

The majority opinion in Sherbert is explicit in its all-but-sole reliance upon the free exercise clause of the First Amendment: "In view of the result we have reached under the...guarantee of free exercise of religion..." 374 U.S. at 410. At several points the holding is stated and restated in these terms:

Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.' Everson v. Board of Education, 330 U.S. 1, 16. 374 U.S. at 411 (emphasis in original).

* * * * *

Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling [of South Carolina] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition

> of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. 374 U.S. at 404.

Because the Court found the disqualification from unemployment benefits to "impose [a] burden on the free exercise of appellant's religion," albeit an unintended and indirect burden, ibid. at 403-4, it required of South Carolina a showing of some countervailing and compelling state interest. South Carolina was held to have made no such showing. 4/ Indiana in this case has not even attempted it, either below or in its opposition to certiorari.

Although Justice Brennan's opinion for the Court notes that the "unconstitutionality of the disqualification of the

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4/ South Carolina suggested in Sherbert a compelling state interest in maintaining such disqualifying standards in order to prevent fraudulent claims, and to increase cost-saving and efficiency. Sherbert found those interests, both as applied and on their face, inadequate as a justification of the denial of exemptions. 374 U.S. at 407. See also infra n.8.

Sabbatarian" on Free Exercise grounds is "compounded" by a further religious discrimination against Saturday worshippers and in favor of Sunday worshippers, Sherbert at 406-7, the various opinions in Sherbert make clear that the decision rested firmly, and independently, on the Free Exercise ground. 5/

5/ This is clear from the language referring to the relative disadvantaging of Saturday worshippers as "compound[ing]" the previously established "unconstitutionality" under Free Exercise analysis 374 U.S. at 406-7. Neither Justice Stewart's concurrence, nor Justice Douglas', relied in any way on the establishment objection to the South Carolina statutory scheme. The dissents of Justices Harlan and White also took Sherbert to rely solely on the Free Exercise ground, and dissented because although accommodation was in their view permissible, they did not believe it was compelled by the Free Exercise Clause. Braunfeld v. Brown, 366 U.S. 599, (1961) decided not many terms earlier, also makes implausible any interpretation of Sherbert as resting solely on the ground that South Carolina had improperly accommodated only Sunday worshippers. Subsequent cases, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) and TWA v. Hardison, 423 U.S. 63 (1977), make clear that state

(footnote cont'd next page)

In short, contrary to Indiana's attempt at distinguishing Sherbert simply as an equal-protection-free religions case, Opp. to Cert. at 6, the more generous principle on which Sherbert was plainly decided, and for which it stands, is that a state, absent a compelling countervailing interest, has a duty to take reasonable steps to accommodate the free exercise interests of its religious citizens. Cf. Trans World Airlines v. Hardison, 423 U.S. 63 (1977)

(footnote cont'd from previous page) accommodation to Free Exercise claims presents no Establishment Clause difficulties and that Sherbert's acceptance of the accommodation principle is now firmly embedded in First Amendment jurisprudence. Our no doubt imperfect survey of district and appeals court decisions citing Sherbert, over some seventeen years, yields not one citation for the proposition that the controlling principle in Sherbert was South Carolina's negligible "establishment" of Sunday Sabbatarianism.

(42 U.S.C. §2000e). The rule of Sherbert is that in a program of temporary insurance benefits for periods of unemployment, an otherwise willing and able insured worker who through no fault of his own - and indeed through no change in his own convictions or practices - finds himself put to a choice between conscientious religious observance and satisfactory job performance must at least be allowed to argue, as "good cause," his religious and conscientious incapacity. That principle controls this case, and requires reversal of the judgement below.

II. REASONABLE ACCOMMODATION TO PETITIONER'S FREE EXERCISE CLAIMS IS MANDATED BY THE FIRST AMENDMENT.

Unless it is to be overruled, Sherbert is firm authority for the proposition, central to petitioner's case, that conflict between Free Exercise claims and state regulatory authority must be resolved by reasonable state accommodation to free exercise of religious beliefs. See also Wisconsin v. Yoder, 406 U.S. 205 (1972); see generally Tribe, American Constitutional Law, at 819-834 (1978).[6/]

There has been some academic criticism of Sherbert, some suggesting that the Sherbert exemption is an invalid establishment of religion insofar as it favors, say, Saturday Sabbatarians over Saturday football fans--or even devoted parents who would spend Saturdays with their children.

[6/] As previously noted, even Justices Harlan and White, in dissent, thought that accommodation was permitted by the First Amendment, although they did not believe it was compelled. Sherbert at 422. Justice Harlan, at least, further believed that accommodation would have to broadly extend to conscientious beliefs. See, e.g., Welsh v. United States, 398 U.S. at 333 (1970) (Harlan, J., concurring); see also Walz v. Tax Commission, 397 U.S. 664, 694 (1970); United States v. Seeger, 380 U.S. 163 (1965).

This was the position taken, even before Sherbert, by Professor Kurland. See his Of Church and State and the Supreme Court, 29 U.Chi.L.Rev. 1(1961). See also Weiss, Privilege, Posture and Protection: "Religion" in the Law, 73 Yale L.J. 593 (1964). And, more recently, it is the position consistently and vigorously advocated by Professor Ely. See his Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1313 (1970), and also his Democracy and Distrust (1980). Professor Ely proceeds from the general proposition that disadvantageous impact of state regulation and classification never warrants, by itself, judicial invalidation. Only when such impact permits an inference of invidious or discriminatory motivation, he argues, should it trigger court scrutiny. Sherbert, he concedes, 79 Yale L.J. at 1319, "plainly stands for the contrary view, that a regulation's unintended adverse impact upon persons of a particular faith can invalidate it." But "the course of action thus suggested by the Court--granting exemption only to religious persons--is supremely suspect under the establishment clause...." Welsh and its companions, as Professor Ely reads them, are the proof of his argument: Any exemption

for free exercise, if it is to escape the establishment critique, must be so broad as to be unworkable - and would "in practice inevitably favor religious objectors." Id. at 1321.

We disagree.

A doctrine of neutrality as between religion and non-religion so austere and restrictive as that suggested by Professor Ely would in fact suggest an incoherence in the First Amendment itself, which, after all, gives a special place to the free exercise not of conscience simply, or personal preference, but of religion. This is not to say that Welsh and the like are wrong in broadening and extending the constitutionally permissible - and indeed constitutionally requisite - horizons of what we mean by the term "religion." The logic of the Establishment Clause forces us in fact to break away from any merely conventional notion of what counts as religion. But some core notion of "religion" - such as the Court elaborated in Seeger and Welsh - is compelled by the very wording of the Religion Clauses of the First Amendment. Wisconsin v. Yoder, 406 U.S. at 215. Without it, constitutional analysis in this area would founder even where an invidious regulatory or administrative motivation is claimed,

since the First Amendment argument must always have it that "I am discriminated against - or unduly burdened - because of my religion."

Why, after all, did the Framers make special provision for the free exercise of religion? The historical experience, no doubt, accounts for it well enough: those who knew religious persecution wanted no more of it. See generally Everson v. Board of Education, 330 U.S. 1, 27-74 (1947)(Rutledge, J.- dissenting). But at the center of that historical experience is an idea of the place of religious conviction - and its analogue, deeply-held moral principle - in human experience. To put it quickly and simply: A believer cannot argue with his God. What Holmes called the "can't helps" - and religious pacifism and Sabbatarianism are surely two of the most compelling we know - simply cannot easily be evaded in the ordinary human scheme. To ask Sherbert to work on Saturday, or Thomas to assemble tanks, is to ask them to do something of which they are in human fact virtually incapable - not physically, of course, but conscientiously and perhaps even psychologically.

To insist upon the accommodation of such conscientious incapacity, under the Free Exercise Clause, is only in the most abstract

sense to establish one religion over another, or religion over non-religion.

More concretely, and more plainly, it is to respect an incapacity in human beings which, however "subjective," lies very near the heart of our moral and constitutional traditions. Reasonable differences will remain, no doubt, over what is or is not to be fostered and protected, particularly against unintended regulatory or classificatory burdens. But it is unreasonable to the point of fanaticism to insist that no such exemptions can be granted in any case. This would be to take what we all acknowledge to be the dilemma of a Constitution providing both for free exercise and against establishment, and resolve it by insisting, simply and almost magically, that it go away - taking with it the protection that surely both clauses were meant to afford to the likes of Sherbert and Thomas. "The course of constitutional neutrality," this Court said in Walz, "cannot be an absolutely straight line; rigidity could defeat the basic purpose of these provisions...." 397 U.S. at 669.

And so, even while it has recognized the tension between the Religion Clauses, the Court nonetheless has properly followed Sherbert and has continued to accord constitutional protection to Free Exercise claims

where they arise in the context of requests for exemption from otherwise valid regulatory statutes. See, e.g., Wisconsin v. Yoder; cf. TWA v. Hardison. See generally Tribe, American Constitutional Law, at 851-853. The constitutional rule is settled: where, as here, a state has plainly interfered with the Free Exercise of a religious belief - that is, prevented a believer from applying his beliefs to the conduct of his life - the state can succeed only if it demonstrates interest of sufficiently compelling magnitude to override the Free Exercise claim. Wisconsin v. Yoder, 406 U.S. at 214; Sherbert, 374 U.S. at 402.[7/]

Were Thomas asking for an unreasonable accommodation, an exemption that would seriously impair substantial state interests - if, for example, he claimed that his religious beliefs rendered him unavailable for any remunerative work - then this would be a different

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[7/] The interest that the state must assert is not its general interest in maintaining the underlying regulatory program for unexceptional cases, but rather a particular interest in denying a religious exemption. See, e.g., Wisconsin v. Yoder, where the Court accepted the strong state interest in advanced compulsory education but found insufficient reason to deny a religious exemption claim. See generally Tribe, American Constitutional Law, at 855-857.

case. For example, the court in Yoder implied that a claim for exemption from all compulsory education, rather than two additional years beyond the eighth grade, might well have led to a different result, and it had previously emphasized that Sherbert was "not a case in which an employee's convictions serve to make him a non-productive member of society." 374 U.S. at 410. Different facts, as the Yoder Court noted, may well lead to a different balancing of free exercise and state interests. But unreasonable accommodation, as Sherbert and Yoder make clear, has proven to be a workable constitutional standard.[8/] The states have lived with it and, generally, made it work. And it has been adopted by Congress, and applied by this Court, in a statutory context. See TWA v. Hardison, supra (applying Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e).

8/ In a different context, the Court has decided that facially neutral governmental regulation incidentally infringing free speech rights will be struck down where the "incidental restriction is...greater than essential to the furtherance "of the governmental interest. United States v. O'Brien, 391 U.S. 367, 377 (1968).

To those who find themselves at odds with the conventional views of such things as war, worship, and revelation, this rule is a shield against the more or less daily threat of subtle, or not so subtle, ostracism and discrimination. Those, like Thomas, Yoder, and Sherbert, who wager much of their lives on absolutes unacceptable or unpersuasive to the rest of us, have found in the rule at issue the tolerance for religious belief and the religiously-informed life that the Free Exercise Clause was designed to foster and protect.

CONCLUSION

For the foregoing reasons, the judgment of the Indiana Supreme Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-952

EDDIE C. THOMAS,

Petitioner,

vs.

THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, WILLIAM H. SKINNER, J. FRANK HALEY, and RALPH MILES, as members and constituting the Review Board of the Indiana Employment Security Division,

and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Indiana

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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Respondents.

On Writ of Certiorari to the Supreme Court of Indiana

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The undersigned, as counsel for the American Jewish Congress, respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Petitioner Eddie C. Thomas' claim that the statute herein challenged, as applied to him, violates the First Amendment to the United States Constitution.

Consent to the filing of the attached brief was sought from the parties. Counsel for the Petitioner consented. The Attorney General of Indiana, counsel for the Respondents The Review Board of the Indiana Employment Security Division, and its members, declined to consent.

The interest of the *amicus* is set forth in the attached brief. The *amicus* requests permission to file this brief because it believes that this case presents a serious threat to the principles of religious freedom to which it is firmly committed. The *amicus* believes that its accumulated experience enables it to address the constitutional issues raised on this appeal in the broad context of this country's tradition of religious freedom and that its brief will therefore assist the Court in the disposition of this case.

Respectfully submitted,

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BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

Interest of the *Amicus*

This brief is submitted on behalf of the American Jewish Congress, a national organization of American Jews, founded by Rabbi Stephen S. Wise, Supreme Court Justice Louis D. Brandeis, Federal Judge Julian Mack and others

to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. Our interest in the case before the Court arises from our long-standing commitment to the First Amendment's guarantee of the free exercise of religion and our perception that the decision of the court below is inimical to the cause of religious freedom.

We believe that the decision below is fundamentally at odds with this Court's decision in *Sherbert* v. *Verner,* a case in which we submitted an *amicus curiae* brief. In addition, we believe that the decision of the Supreme Court of Indiana is tainted by its consideration of factors which are dangerously destructive of the basic principles of religious freedom which underlie the First Amendment.

Constitutional Provisions and Statutes Involved

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Chapter 15, Section 1 of the Indiana Employment Security Act, Indiana Code Section 22-4-15-1 (Burns 1976 Supp.) provides:

> With respect to benefit periods including extended benefit periods established subsequent to July 6, 1974, and before July 3, 1977, an individual who has vol-

> untarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause shall be ineligible for waiting period or benefit rights for the week in which the disqualifying separation occurred and until he has subsequently earned remuneration in employment equal to or exceeding the weekly benefit amount of his claim in each of ten (10) weeks. . . .

Chapter 32, Section 9 of the Indiana Employment Security Act, Indiana Code Section 22-4-39-9 (Burns 1974) provides:

> Any decision of the liability referee shall be conclusive and binding as to all questions of fact. . . .

Statement of the Case

Petitioner-claimant Eddie C. Thomas, a Jehovah's Witness, was hired to work in respondent-employer Blaw-Knox' roll foundry. After working there almost one year, the roll foundry closed and Blaw-Knox transferred Thomas to a job as chainman hooker on the turret line. On his first day on the new job, Thomas realized that the work he was doing—producing turrets for tanks—was armament-related. After checking the board where job openings were posted, he concluded that "all of Blaw-Knox was armaments." Thomas asked for a lay-off, which was denied, and, on November 6, 1975, having worked as a chainman for less than one month, he quit, stating that continuing to work with armaments would violate his religious principles.

Thomas applied for unemployment compensation benefits under the Indiana Employment Security Act, Indiana

Code Sections 22-4-1-1 *et seq.* (Burns 1974 and 1976 Supp.). At the administrative hearing, Thomas, who was not represented by counsel, testified that contributing to armaments production was at odds with his religious beliefs. He said that upon transfer to the turret line and realization that these turrets were for tanks, he consulted another Blaw-Knox employee, a friend of his who was also a Jehovah's Witness. The friend advised Thomas that he did not view working at Blaw-Knox as "unscriptural." Thomas was unable to "rest with" this view which was based on a less strict interpretation of Jehovah's Witnesses' principles than his own.

When asked at the hearing to explain what kind of work his religious views would permit, Thomas testified that his religious beliefs did not conflict with the work he did at the roll foundry and that his conscience would allow him to engage indirectly in the production of arms, for example, as an employee of a raw material supplier. Thomas was never asked to explain the doctrinal basis for his opposition to participation in arms production or for the line he drew between direct and indirect participation.

The hearing referee found, as fact, that Thomas' religious beliefs specifically preclude him from producing or aiding in the manufacture of items used in the advancement of war. He further found, as fact, that Thomas had quit his job because of these religious convictions. The referee concluded, however, that Thomas had not discharged his statutory duty of establishing that he did not voluntarily leave his employment "without good cause in connection with the work." Indiana Code Section 22-4-15-1. The Review Board

adopted the referee's finding and conclusions, and affirmed the denial of benefits.

The Court of Appeals of Indiana reversed the decision of the Review Board, holding that the disqualification provision of Section 22-4-15-1, as applied to Thomas, impermissibly burdened his First Amendment right to the free exercise of religion. *Thomas* v. *Review Board,* 65 Ind. Dec. 238, 281 N.E.2d 888 (1978).

The Supreme Court of Indiana, by a 3-2 vote, vacated that decision, finding but an indirect infringement, if any, of Thomas' free exercise right. The majority, in so holding, stated that Thomas was not required to violate a central tenet of his religion, that the basis of Thomas' belief was unclear, and that the precise nature of his belief was unarticulated. The court further held that the award of unemployment compensation benefits to one who voluntarily quits work for religious reasons, where such benefits are denied to persons who quit work for personal reasons which are not religious, would violate the Establishment Clause of the First Amendment. *Thomas* v. *Review Board,* —— Ind. ——, 391 N.E.2d 1127 (1979).

This Court granted Thomas' petition for certiorari on February 19, 1980.

POINT I

Disqualification from unemployment benefits of one who, for reasons of religicus conscience, is compelled to resign from his job, unconstitutionally deprives him of his free exercise of religion.

The Indiana statute, construed and applied to require forfeiture of benefits for leaving a job for reasons of religious conscience, impermissibly restricts the religious liberty of those whose consciences compel that act. The Supreme Court of Indiana erred in holding that the disqualifying statute, so construed, is valid because it "imposes only an indirect burden, if any, on claimant's free exercise of his religion." *Thomas* v. *Review Board, supra,* —— Ind. at ——, 391 N.E.2d at 1131. Only in the narrowest and most unrealistic sense can it be said that the State of Indiana is not forcing those in Thomas' position to violate their religious consciences. A worker, with no other source of livelihood, who knows that he will receive no unemployment benefits if he resigns from a job because its changed character offends his religious beliefs, can hardly be said to be exercising full freedom of choice. While the compulsion may be indirect, the infringement of free exercise rights is nonetheless substantial. Since it is justified by no compelling state interest, it violates the First Amendment. *Sherbert* v. *Verner,* 374 U.S. 398 (1963).

In *Sherbert* v. *Verner,* this Court addressed the question whether a Seventh Day Adventist could be denied unemployment benefits after she was discharged by her employer for refusing to work on her Sabbath. She was unable to

obtain other work because her religious scruples dictated that she abstain from work on Saturdays. Unemployment compensation benefits were denied under the South Carolina statute because, through her restriction upon availability for Saturday work, she "failed, without good cause . . . to accept suitable work when offered. . . ."

This Court declared the disqualification statute, as applied to Sherbert, unconstitutional. Distinguishing the child labor and polygamy cases, the Court stated that Sherbert's objection to Saturday work did not involve religious-based conduct of a kind within the reach of state legislation. The Court thus reasoned that, if the state court's decision could withstand constitutional challenge,

> it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of [her] religion [is] justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . ."

Id. at 403. The Court concluded that the withholding of benefits interfered with free exercise to the same extent as a fine imposed for Saturday worship. It rejected the contention that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might dilute the unemployment compensation fund and burden the scheduling by employers of necessary Saturday work, holding that it would be incumbent on the State to demonstrate that no alternative form of regulation would combat such abuses without infringing First Amendment rights.

We submit that this case is controlled by *Sherbert* v. *Verner*. As in *Sherbert,*

> not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable.

Since the Board has conceded that no compelling state interest exists to justify that burden, *Thomas* v. *Review Board, supra,* 65 Ind. Dec. at ——, 381 N.E.2d at 895, the decision cannot stand.*

It is true that Thomas was denied unemployment benefits under the disqualifying provision dealing with those who voluntarily quit work without good cause while Sherbert's disqualification arose under an availability for work provision. The distinction is, however, of no constitutional moment. Sherbert was fired by her employer for refusal to work on her Sabbath. If, instead, she had quit when her employer changed her work week from five days to six, and had been denied benefits under South Carolina's voluntary-quit disqualification, the reasoning of the *Sherbert* decision would have compelled the same result as the result reached under the actual facts. Similarly, had Thomas been fired from his job at Blaw-Knox for refusal to work on the turret line, and thereafter refused available work in an armaments factory, and had he been denied benefits for that reason, he would be in precisely the same position as Sherbert. Application of the constitutional principle

* The court below stated that the disqualification provision is designed to minimize unemployment by "encouraging" workers to remain at their jobs. The state however has no legitimate interest, let alone a compelling one, in encouraging persons with religious objections to certain work to put aside those objections in order to continue that employment.

cannot turn on a distinction which, in practical terms, is meaningless.

Indeed, Thomas was in essence involuntarily laid off from his job at Blaw-Knox' roll foundry, a job to which he held no religious objection. He was then involuntarily transferred to a position on the tank turret line which he did find morally offensive.* While he initially accepted the transfer, not realizing what it entailed, and held the job for a short period while struggling to determine whether the work could be reconciled with his religious objections to participation in the production of arms, he ultimately determined that it could not. Having made that decision, he refused to do work in conflict with his religious convictions. Thus, the situation is not significantly different from what it would have been if Thomas had first been laid off from his old job and then been called back for the job in the tank turret line and had refused it. A refusal to accept employment under conditions at odds with religious beliefs was precisely what this Court held protected under the Free Exercise Clause in *Sherbert*. *See Lincoln* v. *True,* 408 F. Supp. 22 (W.D. Ky. 1975); *Hildebrand* v. *Appeals Board,* 19 Cal. 3d 765, 140 Cal. Rptr. 151, 566 P.2d 1297 (1977) (Mosk, J., dissenting), *cert. denied,* 434 U.S. 1068 (1978).

The unemployment compensation boards and the courts of several states have had no difficulty administering unemployment compensation schemes so as not to burden Free Exercise rights of the kind asserted by Thomas. Thus, in fact situations virtually identical to the one presented here,

* This is thus not a case where an employee accepts employment knowing that it is at variance with his religious beliefs.

statutory disqualification provisions have been ruled inapplicable. *See* App. Bd. Dec. 24,048-52 Unempl. Ins. Rep. (N.Y.) (CCH) ¶1965.12 (since religious objection to working on military implements of destruction because of religious beliefs, acceptance of such work being an offense to claimant's religious and moral conscience, is not a proper basis for disqualification for voluntarily leaving employment without good cause when claimant was transferred to such work from work that was not objectionable to him); Comm. Dec. No. 422-A-51 (Conn. Labor Bull., Nov. 1951) 3 Unempl. Ins. Rep. (CCH) (Conn.) ¶1975.12 (when claimant became aware of the fact that the assembly work he was assigned to do was ultimately destined to be used for military purposes, he quit his job on the grounds that his religion forbade him doing any work that would contribute to the injury or destruction of human beings. "Due to the exigencies of our times, the job on which the claimant worked was changed from a civilian one to one which produced goods for military purposes. From the moment that happened, the work that the claimant was doing became offensive to his religious convictions,—to which he was entitled to hold under the Constitution. From that moment, his work became unsuitable as no person is compelled, as a condition of collecting unemployment benefits, to conduct himself contrary to his religious beliefs or convictions.").*

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* See also *Brewster* v. *Board of Review,* 8 Unempl. Ins. Rep. (CCH) (Ohio) ¶1965.13 (Ohio Ct. of Com. Pleas, Ashland Cty. 1963) (claimant had right to refuse job as waitress where she would have to serve alcoholic beverages, due to the degree of risk to her moral belief and religious principles); App. Trib. Dec. No. AT-4572-57 (10/29/59), 8 Unempl. Ins. Rep. (CCH) (N.D.) ¶1975.13 (claimant employed by a secret order whose tenets are unacceptable to her and who quits rather than becoming a member of the order had good cause); *Syrek* v. *California Unemployment Insurance Appeals*

(footnote continued on next page)

While these results may be explained in part by differences in the language of the respective state disqualification statutes, they are also consistent with the First Amendment of the Constitution. The decision of the Supreme Court of Indiana is not.

To describe Thomas' resignation as a "voluntary quit" is to ignore the difference between a choice compelled by religious conscience after a unilateral transfer which changes the nature of the job and a choice, for example, motivated by emotional difficulties. *See Geckler* v. *Review Board,* 244 Ind. 473, 193 N.E.2d 357 (1963). To hold that such a resignation is without "good cause" is to exhibit not neutrality, but hostility, to religion. To call religious conviction mere "personal reasons" in the same category as child care and transportation problems, *see Gray* v. *Dobbs House, Inc.,* —— Ind. App. ——, 357 N.E.2d 900 (2d Dist. 1976), is to ignore the fact that the Free Exercise Clause of the First Amendment places religious beliefs and practices in a special and protected class. In short, to deny Eddie C. Thomas unemployment compensation benefits violates both the letter and the spirit of *Sherbert* v. *Verner.*

Board, 7 Cal. Rptr. 97, 54 Cal. 2d 519, 354 P.2d 625 (1960) (conscientious objector's refusal to accept employment because loyalty oath required held with good cause); Bd. of Rev. Dec. No. 44-BR-60 (9/1 UCIS Ben. Ser., 10220-Tenn. R) 10 Unempl. Ins. Rep. (CCH) (Tenn.) ¶1975.131 (mill worker who refused to join union because it conflicted with her religious belief, and who quit when informed by the employer that her job would be discontinued unless she became a member, held to have left voluntarily with good cause, inasmuch as the Tennessee Constitution provides that no human authority may control or interfere with the rights of conscience).

POINT II

The Supreme Court of Indiana misunderstood its role and committed constitutional error by questioning Thomas' underlying religious beliefs.

The decision of the Supreme Court of Indiana that the disqualifying statute, as applied to Thomas, worked no infringement of his Free Exercise rights was based at least in part on that court's subjective evaluation of Thomas' religious beliefs and practices. The Review Board found, as fact, that Thomas' objection to armaments work was religious and his reason for quitting the same.* Nevertheless, the Supreme Court of Indiana quoted extensively from Thomas' testimony, given when he was unrepresented by counsel, and relied on Thomas' own words to distinguish his position from Adell Sherbert's:

> Here, although [Thomas'] reasons for quitting work are described as religious, it is unclear what his belief was, and what the religious basis of his belief was. Thomas is not required by statute to violate a cardinal tenet of his religion. Our review of the record here reveals that the basis of claimant's belief is unclear. The precise belief is not articulated.

In addition, the Supreme Court of Indiana, as well as the hearing officer and the Review Board, appeared to be influenced by the fact that Thomas' friend, also a Jehovah's Witness, found nothing unscriptural about working at Blaw-Knox. See *Thomas* v. *Review Board, supra,* —— Ind. at - —, 391 N.E.2d at 1128.

---

* Under Indiana's Unemployment Security Act, Section 22-4-32-9 (Burns 1974), those factual findings are conclusive and binding.

The Supreme Court of Indiana's consideration of these factors was wholly improper. The Free Exercise Clause protects more than "cardinal tenets" of a religion. Its guarantees do not extend only to religious beliefs which are shared by all members of a sect. Its protections do not depend upon the degree of articulateness with which a claimant expresses his religious views. And the applicability of the Free Exercise Clause surely does not depend on whether a court or other state agency finds the religious belief in question comprehensible or clear.

The Indiana court's limitation of Free Exercise protection to those religious practices which are compelled by a religion's "cardinal tenets" finds no support in the First Amendment or in the decisions of this Court construing it. First, the court's view that refusal to do armaments-related work does not derive from a central tenet of the Jehovah's Witnesses is almost inexplicable. The opposition of Jehovah's Witnesses to military service and to related work is well known to this Court. *See, e.g., Sicurella* v. *United States,* 348 U.S. 385 (1955); *Gibson* v. *United States,* 329 U.S. 338 (1946); *Estep* v. *United States,* 327 U.S. 114 (1946).

Moreover, while this Court has sometimes used the words "fundamental" or "basic" in describing the tenets it was protecting against governmental encroachment, *see, e.g., Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), *Sherbert* v. *Verner, supra,* 374 U.S. at 399 n.1, its use of those terms cannot be read as a limitation on the kinds of religious practices protected by the Free Exercise Clause. The decisions make it clear that, once it is established that a governmental regulation significantly interferes with religious-

based conduct, the test for its validity is whether or not it poses a substantial threat to public safety, peace or order. We know of no decision that suggests that the relevant test is the centrality of the religious belief. That is not surprising. Judicial determinations as to whether a particular religious practice is based on a "fundamental tenet" or on a less-than-fundamental tenet necessarily would involve the court in just the type of inquiry which the First Amendment prohibits.

The court below was in error not only in imposing this "cardinal tenets" limitation but also in giving weight to the fact that one of Thomas' co-religionists did not find working at Blaw-Knox at odds with his religious beliefs. Consideration of this factor in effect limits Free Exercise rights to practices which derive from the tenets of established religious sects. This is not the law. An individual's sincere religious belief, even if not shared by all members of a sect, is still within the protection of the First Amendment. *Lewis* v. *Califano,* No. 79-1739, slip op. at 17 (3d Cir. Feb. 21, 1980).

The First Amendment was designed in large measure to protect freedom of conscience. To fulfill this goal, the Amendment must be read to protect the conscience of each individual. See Merel, *"The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment,"* 45 *Chi. L. Rev.* 805 (1978). In *Davis* v. *Beason,* 133 U.S. 333, 342 (1890), this Court defined religion and spoke of the Amendment's concern for individuals:

> The term "religion" has reference to one's view of his relations to his Creator, and to the obligations they

> impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper. . . .

In his concurring opinion in *School District of Abington Twp.* v. *Schempp,* 374 U.S. 203, 231 (1963), Justice Brennan said:

> The constitutional mandate expresses a deliberate and considered judgment that such matters are to be left to the conscience of the citizen, and declares as a basic postulate of the relation between the citizen and his government that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand. . . ."

As Judge Weinstein wrote in *Stevens* v. *Berger,* 428 F. Supp. 896, 900 (E.D.N.Y. 1977):

> So far as our law is concerned, one person's religious beliefs held for one day are presumptively entitled to the same protection as the beliefs of millions which have been shared for thousands of years.

Finally, the Indiana court's reliance on Thomas' lack of clarity in expressing his religious views and its inability to comprehend the doctrinal underpinnings of Thomas' refusal to do armaments-related work also taint that court's

holding. Consideration of those factors is in clear conflict with the commands and purposes of the Free Exercise Clause.

Not every belief is a religious belief entitled to the protection of the First Amendment. Nor is every practice which is claimed to be religious entitled to protection from governmental regulation by reason of the Free Exercise Clause. However, in determining what practices are "religious" and thus, presumptively, within the clause's scope, the sole valid considerations are whether the practice derives from a belief which is religious in nature and sincerely held. *See Wisconsin* v. *Yoder, supra, United States* v. *Seeger,* 380 U.S. 163 (1965). As this Court stated in *United States* v. *Seeger, supra* at 184, in construing the statutory exemption of conscientious objectors from combatant training and services:

> *it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways.* In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. . . . The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government. As Mr. Justice Douglas stated in *United States* v. *Ballard,* 322 U.S. 78, 86 (1944): "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. *Religious experiences which are as real as life to some may be incomprehensible to others.*" (emphasis added).

Religious beliefs are not required to be consistent, logical, acceptable, or comprehensible to others. A religious belief which appears to every other member of the human race preposterous still merits the protections of the First Amendment. See *In re Jenison,* 265 Minn. 96, 120 N.W.2d 515, *vacated and remanded in light of Sherbert* v. *Verner,* 375 U.S. 14, *on remand,* 267 Minn. 136, 125 N.W.2d 588 (1963) (objection to jury service based on Biblical injunction "Judge not lest ye be judged"); *Stevens* v. *Berger,* 428 F.Supp. 896 (E.D.N.Y. 1977) (religious objection to use of social security number); *Teterud* v. *Burns,* 522 F.2d 357 (8th Cir. 1975) (wearing of long braided hair by Indian).

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .

West Virginia State Board of Education v. *Barnette,* 319 U.S. 624, 641-42 (1943).

The Indiana court, in questioning Thomas' underlying religious beliefs, overstepped constitutional bounds. Its decision, tainted by the consideration of irrelevant and impermissible factors, cannot stand.

POINT III

Extension of unemployment benefits to one who, for reasons of religion, is compelled to resign from his job would not violate the Establishment Clause of the First Amendment.

The Supreme Court of Indiana, citing only *Gillette* v. *United States,* 401 U.S. 437 (1971), and without analysis, stated:

> To hold that an employee who voluntarily quits work for personal reasons and personal beliefs which can somehow be described as religious beliefs, must be allowed benefits while other employees who voluntarily quit work for valid personal reasons or beliefs which are not "religious" are denied benefits, would violate the Establishment Clause of the First Amendment.

—— Ind. at ——, 391 N.E.2d at 1134.

This ruling is flatly inconsistent with the ruling in *Sherbert* v. *Verner* that an award of unemployment compensation benefits to Sabbatarians, even where those benefits are denied to others who for personal non-religious reasons cannot work on Saturdays, "plainly" does not foster the establishment of the Seventh Day Adventist religion. *Sherbert* v. *Verner, supra,* 374 U.S. at 409. If it were otherwise, every religious accommodation made to serve the ends of the Free Exercise Clause would run afoul of the Establishment proscription, a proposition which this Court has repeatedly rejected. In *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664, 668-69 (1970), this Court, reject-

ing a claim that a grant of tax exemption for places of worship violated the Establishment Clause, stated:

> The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. . . .
>
> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Gillette v. *United States,* relied upon by the Indiana court, in no way supports its holding. This Court there held that the federal law exempting from service in the armed forces those who are "conscientiously opposed to participation in war of any form" did not violate the Establishment Clause insofar as persons with religious objections to particular wars were excluded from this exemption. While this Court did state that "as a general matter" the Establishment Clause prohibits government "from abandoning secular purposes in order to put an imprimatur on one religion or on religion as such or to favor the adherents of any sect or religious organization," it also

cautioned that the metaphor of a wall between Church and State should not be taken so literally as to bar governmental action that protects the exercise of religious freedom. The Court stated:

> it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience." *United States* v. *Macintosh,* [283 U.S. 605, 634] (Hughes, C.J., dissenting). See *Abington School District* v. *Schempp,* 374 U.S., at 294-299 . . . (Brennan, J., concurring); *id.* at 306 . . . (Goldberg, J., concurring); *id.* at 309 . . . (Stewart, J., dissenting). See also *Welsh* v. *United States,* 398 U.S., at 370-373 . . . (White, J., dissenting). "Neutrality" in matters of religion is not inconsistent with "benevolence" by way of exemptions from onerous duties, *Walz* v. *Tax Commission,* 397 U.S., at 669 . . .

401 U.S. at 453-54.

The government may, and in certain cases must, give special protection to religious beliefs. *See, e.g., Sherbert* v. *Verner, supra; Wisconsin* v. *Yoder, supra; In re Jenison, supra; Arlan's Department Store, Inc.* v. *Kentucky,* 371 U.S. 218 (1962) (rejecting establishment challenge to statutory exemption from Sunday closing laws for Sabbath observers); *Braunfeld* v. *Brown,* 366 U.S. 559 (1961) (statutory exception for Sabbath observers from compulsory Sunday closing laws "may well be the wisest solution to the problem"); *Arver* v. *United States,* 245 U.S. 366, 389-90 (1918) (religious exemption from combat service); *United States* v. *Seeger, supra* (same).

Traditional "establishment" analysis leads to the same conclusion. Governmental action which is claimed to violate the Establishment proscription must be measured against the three-part test set forth in *Meek* v. *Pittenger*, 421 U.S. 349, 358 (1975), and numerous other cases. The statute must have a secular legislative purpose; it must have a primary effect that neither advances nor inhibits religion; and it must not lead to excessive governmental entanglement with religion.

If Indiana's unemployment compensation scheme were administered to make persons such as Thomas who have left work because of religious convictions eligible for benefits, it would survive scrutiny under each part of this test. The statute, so construed, would serve the valid legislative purpose of ensuring financial support to those without jobs while avoiding the clearly impermissible legislative purpose of encouraging workers to put aside religious convictions which make it impossible for them to perform certain tasks. In no real sense can that construction have a primary effect of advancing the religion of Jehovah's Witnesses. Unemployment benefits are a limited and temporary welfare entitlement of persons who have been employed and who are without employment but looking for and willing to accept jobs. Given the limited nature of the benefits, it cannot seriously be claimed that the statute so construed encourages membership in "favored" religious organizations. Like the conscientious objector to military service, one with religious objections to participation in armaments production is confronted with a "painful dilemma" which "arises precisely because he feels himself bound in conscience not to compromise his beliefs or affiliations." *Gillette* v. *United States, supra,*

401 U.S. at 454. Finally, to extend unemployment benefits to one in Thomas' position does not result in excessive governmental entaglement with religion. Whenever a governmental body is required to pass on a religion-based claim, some entanglement with religion results. The Constitution, however, proscribes only excessive entanglement. The entanglement which would arise here, that incident to adjudicating the sincerity and religious nature of the claimant's beliefs, has been deemed not excessive in numerous contexts. In short,

> Nothing in the Constitution compels the organs of government to be blind to what everyone else perceives—that religious differences among Americans have important and pervasive implications for our society. Likewise nothing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious belief.

School District of Abington Twp. v. *Schempp, supra,* 374 U.S. at 295 (Brennan, J., concurring).

Conclusion

It is respectfully submitted that, for the reasons stated above, this Court should reverse the ruling of the court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-952

EDDIE C. THOMAS,

Petitioner,

v.

THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, WILLIAM H. SKINNER, J. FRANK HALEY, and RALPH MILES, as members and as constituting the Review Board of the Indiana Employment Security Division,

and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Indiana

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE FUND, INC. AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Americans United for Separation of Church and State Fund, Inc. respectfully moves this Court for leave to file the accompanying Brief in this case as Amicus Curiae. The consent of the Attorney for the Petitioner herein has been obtained but Counsel for Respondents has refused to consent to the filing of a Brief by Americans United for Separation of Church and State Fund, Inc. as Amicus Curiae.

The applicant, Americans United for Separation of Church and State Fund, Inc. has an interest in this case in that it and its sister organization, Americans United for Separation of Church and State, are the only national interfaith organizations dedicated exclusively to defending religious liberty and the constitutional principle of church-state separation. Americans United for Separation of Church and State has been involved in most of the major cases reaching this Court concerning the application of the establishment clause of the First Amendment to the United States Constitution. Americans United Fund was formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution. This organization is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

The Amicus Curiae brief raises constitutional issues not explicitly argued by Petitioner's counsel, who has requested that this brief be submitted. The Amicus brief directs itself to the question of whether the Indiana Supreme Court, in applying the secular purpose test of *Braunfeld* v. *Brown,* 366 U.S. 599 (1961), failed to observe the teachings of *Sherbert* v. *Verner,* 374 U.S. 398 (1963). The Amicus brief also directs its attention to the question of whether the granting of unemployment compensation benefits to one whose employment is terminated because of religious convictions violates the establishment clause of the First Amendment. The constitutional arguments made in the Amicus Curiae brief are central to the disposition of this matter and at least as to certain of the points made

will not otherwise be before this Court unless leave is granted for the filing of the Amicus Curiae brief.

Respectfully submitted,

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE FUND, INC. AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Americans United for Separation of Church and State Fund, Inc. is a nonprofit corporation formed to maintain and advance civil and religious liberties

through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the Constitution of the United States.

Americans United Fund is governed by a Board of Trustees composed of members of many religious organizations as well as individuals who are members of no religious body but who are concerned with the preservation of the separation of church and state.

The Board of Trustees of Americans United Fund is composed of the Board of Trustees of Americans United for Separation of Church and State, a sister organization with some forty thousand members of various religious beliefs and of no religious belief in all states of the United States, including the State of Indiana. Americans United Fund is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United for Separation of Church and State has been involved in almost every major case coming before this Court dealing with the question of the establishment clause of the First Amendment to the United States Constitution, including such cases as *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973), and *Meek* v. *Pittenger,* 421 U.S. 349 (1975).

Americans United Fund is particularly interested in the issues raised in this case because although this organization is firmly committed to the preservation of the principles embodied in the establishment clause of the First Amendment, it believes that this clause must not do violence to the free exercise clause. The brief of this Amicus Curiae will argue that the estab-

lishment clause of the First Amendment to the United States Constitution is not violated by accommodating claimant's constitutional rights under the free exercise clause of the First Amendment.

QUESTION PRESENTED

Whether the application of the disqualifying provisions of the Indiana Employment Security Act to the Petitioner, a Jehovah's Witness, constitutes a denial of his First Amendment right to the free exercise of religion when he voluntarily terminated his employment in an armament factory because his religious beliefs prevented him from participating in the production of armaments or in any war-related activities.

SUMMARY OF ARGUMENT

The Indiana Supreme Court, in applying the secular purpose test of *Braunfeld* v. *Brown,* 366 U.S. 599, 607 (1961), failed to observe the teachings of *Sherbert* v. *Verner,* 374 U.S. 398 (1963). It is our position that this Court discarded the earlier secular purpose test used in *Braunfeld* v. *Brown* when handing down its decision in *Sherbert* v. *Verner.* The Court in *Sherbert,* although not specifically overruling its earlier decision, made clear that its threshold inquiry was substantially different from that of *Braunfeld.* Under *Sherbert* there is a much stronger showing required of the state than was required under the "secular purpose test" of *Braunfeld.*

The Indiana Supreme Court failed to apply the teachings of *Sherbert* when it narrowly limited the *Sherbert* ruling to a state unemployment availability-for-work requirement. Rather than being so limited, the *Sherbert* test is to be applied in all First Amend-

ment cases, particularly those involving the free exercise clause of the First Amendment to the United States Constitution. In failing to apply *Sherbert* the Indiana Supreme Court reached a result which denies claimant his constitutional rights under the First Amendment.

The establishment clause of the First Amendment does not prohibit the granting of unemployment compensation benefits to one whose employment is terminated because of religious convictions, and the Supreme Court of Indiana misinterpreted the decisional law concerning the establishment clause of the First Amendment. This Court's prior decision in *Sherbert* embraces the concept of religious accommodation.

ARGUMENT

I.

THE INDIANA SUPREME COURT IN APPLYING THE SECULAR PURPOSE TEST OF *BRAUNFELD* v. *BROWN* FAILED TO OBSERVE THE TEACHINGS OF *SHERBERT* v. *VERNER*

The majority opinion of the Indiana Supreme Court in the instant case appears to ignore seventeen years of decisional law when it anchors its opinion on the secular purpose test of this Court's decision in *Braunfeld* v. *Brown,* 366 U.S. 599, 607 (1961).

The right to believe and worship according to a personal belief in a supreme being has been repeatedly declared by our courts to be a cherished and fundamental right central to an individual's freedom. It was not by accident that the first sentence of our Bill of Rights in exacting language prohibits Congress from making any law respecting an establishment of religion

or prohibiting its free exercise. The constitutional fabric of our nation has woven within it the concept that religious freedom is to be protected as an exhalted right. It is basic that the free exercise of religion occupies a fundamental and preferred position. *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943).

As the late Professor Kauper stated: "Of all the constitutional guarantees, the protection of religious liberty has been the most exhalted." P. Kauper, *Religion and the Constitution* 19 (1964) (and the cases cited therein).

The Chief Justice in referring to the preferential position of the First Amendment recently stated it this way: "The values enshrined in the First Amendment plainly rank high 'in the scales of our national values, ..." *N.L.R.B.* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979).

In spite of the repeated judicial assertions revering the free exercise clause of the First Amendment, those individuals who laid claim to these rights in our courts rarely prevailed against the government prior to the decision of this Court in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), when the Court first articulated its now historic ruling concerning free exercise rights under the First Amendment to the United States Constitution.

The Indiana Supreme Court in blinding its eyes to the holding in *Sherbert* cites as its only authority concerning this sensitive First Amendment free exercise area the 1961 pre-*Sherbert* decision in *Braunfeld.* See references made by the Indiana Supreme Court in its

decision in the instant case, 391 N.E.2d 1127, 1129, 1130-31 (1979).

The Indiana Supreme Court in a flashback to the 1961 decision in *Braunfeld* adopted the pre-*Sherbert* holding which stated that where the burden of a state regulation imposed on a "free exercise" right, the court need only determine if the purpose and effect of the state regulation in question is to advance the state's secular goals. *Braunfeld, supra* at 599.

It is submitted, however, that this Court made a major shift in balancing the interests of the state against the free exercise rights of an individual in the landmark case of *Sherbert* v. *Verner, supra.* The Court in *Sherbert,* although not specifically overruling its earlier decisions, expanded the scope of the previously dormant free exercise clause as well as the extent of the required inquiry into the state's interest set up in opposition to the free exercise clauses. *Sherbert* has given the free exercise clause its present vitality. It established a new balancing test to resolve the competing interests existent when First Amendment rights are at stake.

In *Sherbert,* Adelle Sherbert, a member of the Seventh-day Adventist Church, was fired because her religious beliefs would not permit her to work on Saturday, which was her Sabbath. Mrs. Sherbert found it impossible to locate other employment which did not demand secular Saturday employment. She filed a claim for unemployment compensation benefits. The state denied her claim for unemployment benefits, making the determination that she was not entitled to benefits because she had not made herself available for suitable work when offered by the state employment office. *Id.* at 401.

The Court in a substantial deviation from this Court's earlier ruling in *Braunfeld* wrote that in this highly sensitive constitutional area "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation, *Id.* at 406 citing *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945).

In *Sherbert,* the Court in considering the competing interests announced the test for a free exercise case: 1) Is there a burden imposed on the exercise of religion? *Id.* at 403. 2) If there is such a burden, is the infringement justified by a compelling governmental interest? *Id.* at 406. 3) Even if a compelling governmental interest has been shown to exist, is there any less intrusive, alternative means available to meet the state's objective? *Id.* at 407.

The Court made clear that not every governmental interest will overbalance a free exercise claim. The interest must be shown to involve a grave and paramount state concern. *Id.* at 405.

It appears that one of the most important changes in the Court's view when deciding a case where the delicate concerns of religious liberty are at stake was the Court's announcement that it is the government and not the individual that has the burden of establishing 1) that there is a compelling governmental interest and 2) the existence of no less intrusive means whereby the state may carry out any such vital state objective.

In *Sherbert,* the Court made clear that its threshold inquiry was substantially different from that of *Braufeld.* There was to be a much stronger showing by the state than that required under the "secular purpose test" of *Braunfeld.* It seems that this Court has discarded the *Braunfeld* test. The *Braunfeld* Court

speaks of exercising the "most critical scrutiny" when an individual asks the Court to strike down governmental action that only has an indirect impact on his free exercise claim. *Braunfeld, supra* at 606. In *Sherbert* the Court demands a searching examination of the government's claimed compelling state interest and the impediment to those objectives that flow from an outright exemption for the individual.

One of the most significant post-*Sherbert* decisions is this Court's holding in *Wisconsin* v. *Yoder,* 406 U.S. 205, 215 (1972), where this Court, citing *Sherbert,* held that there must be a state interest of significant magnitude to override an individual claim to protection under the free exercise clause: "The essence of all that has been said and written on the subject is that only those interests of the highest order can overbalance legitimate claims to the free exercise of religion."

In *Yoder,* the Court upheld the right of Amish parents to remove teenage children from the public schools and held unconstitutional, as applied to members of the Amish religion who had graduated from the eighth grade, the provisions of the state's compulsory education laws.

In *Yoder,* the state advanced a number of arguments seeking to meets its burden of establishing a compelling state interest. This Court, however, rejected each argument advanced by the state and pointed out that the alleged overriding interest of the state must be carefully and sensitively examined. This, the Indiana Supreme Court failed to do. Instead of following the teachings of *Sherbert* and its progeny, the court reverted to the underdeveloped free exercise concept embodied in the *Braunfeld* decision.

In the instant case, the State of Indiana did not even attempt to meet the requirements of the *Sherbert* test. In fact it admitted that there was no compelling state interest involved. Pet.App. 13a; 381 N.E. 2d 888, 892 (1979). Professor Lawrence Tribe in his recent authoritative book on the Constitution, recognizes the continuing validity of the *Sherbert* test. L. Tribe, *American Constitutional Law* 851-865 (1978).

Of significance to the facts of this case is this Court's discussion of public welfare benefits. *Sherbert, supra* at 405. The basic decision in *Sherbert* was itself a reaffirmation of a basic principle previously announced by this Court that no person should be excluded from receiving benefits of public welfare legislation as a result of his or her religious beliefs. *Id.* at 410.

In *Sherbert* this Court said: "*If the* purpose or *effect of a law is to impede the observance of one or all religions* or is to discriminate invidiously between religions, *that law is constitutionally invalid even though the burden may be characterized as being only indirect.*" *Id.* at 404 (emphasis added).

It is respectfully submitted that the Indiana Supreme Court failed to apply the teachings of *Sherbert* when it narrowly limited the *Sherbert* ruling to a state unemployment availability for work requirement. *Sherbert* spoke not just to unemployment compensation eligibility requirements. Unless the state shows a compelling public interest, *Sherbert* teaches that the conditions upon any public welfare benefits cannot be sustained if they so operate, whatever their purpose, to inhibit or deter the free exercise of First Amendment freedoms.

It is equally clear that the decision in *Sherbert* is not merely applicable to governmental action relating

to public welfare. The decision in *Yoder* reinforced and amplified the Court's earlier holdings in *Sherbert* that the free exercise clause of the First Amendment requires the state to render substantial deference to religiously motivated behavior in the application of its laws and regulatory schemes. The balancing test announced in *Sherbert* was not designed to narrowly apply only to unemployment compensation or even public welfare cases. Rather, it represents the result of evolving judicial standards concerning the free exercise doctrine. The decisions of this Court in *Sherbert* and *Yoder* represent a departure from the secular purpose test applied in *Braunfeld.* The *Sherbert* test is more sensitive to the religious concerns of individuals than the secular purpose test which was applied in *Braunfeld.*

Although the *Sherbert* test was applied within the context of the free exercise situation, it has also been applied to a variety of other First Amendment issues. *Women Strike for Peace* v. *Hickel,* 420 F.2d 597, 605 (D.C. Cir. 1969); *Barnett* v. *Rodgers,* 410 F.2d 995, 1000 (D.C. Cir. 1969); *Heilberg* v. *Fixa,* 236 F.Supp. 405, 408 (N.D. Cal. 1964).

The continued application of the *Sherbert* test is the best protection against a government that from time to time loses sight of the fact that its most compelling governmental concern should be to insure the protection of those rights guaranteed by the Bill of Rights. This Court again should reassert the proposition that "a regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Yoder, supra* at 220. This requirement may not be met by merely

asserting that if the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the state's secular goals, the statute is valid despite its indirect burden on religious observance. To so hold would place in jeopardy the now well established free exercise rights of all Americans.

II.

THE GRANTING OF UNEMPLOYMENT COMPENSATION BENEFITS TO ONE WHOSE EMPLOYMENT IS TERMINATED BECAUSE OF RELIGIOUS CONVICTIONS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The Indiana Supreme Court has raised the spectre of the establishment clause. It contends that the granting of unemployment benefits to petitioner would result in a violation of the establishment clause of the First Amendment. As the dissenting opinion of the State Supreme Court and the majority decision of the Court of Appeals in this case pointed out, a decision favorable to Mr. Thomas in this case in no way fosters the establishment of the Jehovah's Witness religion in the State of Indiana, but merely reflects "the governmental obligation of neutrality in the face of religious differences." *See Sherbert* v. *Verner, supra* at 309.

Sherbert is not merely a decision dealing with the free exercise clause. As an establishment case, *Sherbert* is significant in that it makes clear that exemptions solely on the basis of religion are not necessarily establishments of religion if they are designed to protect the free exercise of religion.

In *Everson* v. *Board of Education,* 330 U.S. 1 (1947), this Court held that the establishment clause incor-

porates the principle of separation of church and state. It not only prohibits an established church and preferences among religions, but it seeks to isolate the affairs of government from matters religious in nature.

The following year, this Court in *Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203 (1948), considered a case in which a parent-taxpayer brought suit to halt a program of "released time" for sectarian religious education conducted on the public school premises. The aid to religion in *McCollum* was not merely incidental to a secular purpose but was a direct encouragement to religion. This was not a case where the state was merely seeking to protect the free exercise of religion. In effect the state threatened the free exercise of religion of those pupils not members of the major religious faiths. The nature of the plan was such that it involved subtle, indirect pressures to conform to prevailing religious beliefs.

This Court in *Zorach* v. *Clauson,* 343 U.S. 306 (1952), however, faced a different type of program which has been characterized as "dismissed time" rather than "released time." Under the "dismissed time" plan, the tax-supported school facilities were not used for religious instruction nor was the same degree of compulsion involved. In *Zorach* the Court recognized the principle of religious accommodation and noted that the people of the United States are in fact a religious people. This accommodation was permitted by this Court in order to maintain a neutrality between believers in religion and nonbelievers. In explaining this position, this Court in *Zorach* stated:

> The government must be neutral when it comes to competition between religious sects, and it may not finance religious groups, undertake religious in-

> struction, blend secular and sectarian education, or use secular institutions to force one or more religions on any person, and it may not make religious observance compulsory or coerce anyone to attend church, to observe a religious holiday, or to take religious instruction, but there is no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. . . . *Id.* at 314.

This Court's decision in *Zorach* suggests that "separation of church and state" is not an independent principle, that the principle is that of religious liberty. The religion clauses of the First Amendment must be read together, and religious liberty is to be protected by the First Amendment against government action either establishing religion or prohibiting its free exercise.

Not every "judicial . . . construction which is designed to prevent a public welfare program from abridging the free exercise of religious beliefs, is for that reason *ipso facto* an establishment of religion." *Abington School District* v. *Schempp,* 374 U.S. 203, 303 (1963) (concurring opinion of Mr. Justice Brennan).

This concept of religious accommodation was adopted by this Court in *Sherbert.* In *Sherbert* the Court, as we have previously observed, noted that the state had denied Mrs. Sherbert her First Amendment rights under the free exercise clause since there was no compelling state interest to justify the infringement of her free exercise rights. The Court in *Sherbert* made clear that although judicial action declaring a practice a violation of the free exercise clause might be construed as carving out an exception on the basis of re-

ligion, such an exception may be compelled by considerations of free exercise and cannot be regarded as an establishment of religion.

This Court reviewed the relationship existing between the free exercise and establishment clauses of the First Amendment in *Walz* v. *Tax Commission of City of New York,* 397 U.S. 664, 669-70 (1970):

> Each value judgment under the religion clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the establishment and free exercise clause has prevented the kind of involvement that would tip the balance toward government control of churches or government restraint on religious practice.

It is our belief that the opinion of the Court of Appeals of the State of Indiana correctly ruled that the establishment clause of the First Amendment did not prohibit an accommodation toward the religious needs of the claimant in this case. As the Court of Appeals noted, this Court has apparently recognized that

> "government's actions impinge on different persons in dramatically different ways, so that truly even-handed treatment at times compels exempting those whose religious beliefs are exceptionally burdened by challenged state action. *In this zone of required accommodation,* the theory is that only an illusory and hostile neutrality would be achieved by pursuing a religion-blind constitutional ideal." Tribe, *American Constitutional Law,* § 14-4, p. 821 (1978) (Emphasis in original).

We feel that the Court of Appeals was correct in holding that *Sherbert* makes clear that at times govern-

ment is required under the free exercise of the First Amendment to take affirmative steps to remove barriers to the free exercise of religion by making "special provisions for religious interests in order to relieve them from both direct and indirect burdens placed on the free exercise of religion by increased governmental regulations."

We further believe that this view embraced by the Court of Appeals and by the dissenting opinion in the Indiana Supreme Court do no violence to the language or purpose of the establishment clause of the First Amendment.

CONCLUSION

For the reasons set forth herein, the judgment of the Supreme Court of the State of Indiana results in an unconstitutional denial of claimant's rights under the free exercise clause of the First Amendment to the United States Constitution and misapplies the provision of the establishment clause and therefore must be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-952

EDDIE C. THOMAS,

Petitioner,

vs.

REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF JEWISH PEACE FELLOWSHIP AND FELLOWSHIP OF RECONCILIATION, AMICI CURIAE

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REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION,

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MOTION FOR LEAVE TO FILE BRIEF OF JEWISH PEACE FELLOWSHIP AND FELLOWSHIP OF RECONCILIATION, AS AMICI CURIAE

The above named organizations respectfully move this Court, pursuant to Rule 42 of its Rules, for leave to file the accompanying brief amici curiae in support of the Petitioner herein.

The consent of the parties to the filing of the attached brief has been sought by the moving parties. However, while the petitioner gave his consent, the respondent Review Board of the Indiana Employment Security Division

refused such consent. Amici, accordingly, proceed by this motion.

The amici are religious organizations of Jews and Christians, whose commitment of faith preclude participation in any war and in the production of weapons of war. They share the view of the petitioner herein that denial of unemployment compensation benefits to him by reason of his refusal to participate as an employee in the production of weapons of war violates the Constitution of the United States, particularly the First Amendment, in respect to both the Free Exercise and Establishment Clauses. They believe that the Supreme Court of Indiana was in error in reversing the determination of the Indiana Court of Appeals that denial of unemployment benefits to petitioner would violate the Constitution of the United States.

Accordingly, the amici support the position of the petitioner and move that the Court accept and consider the accompanying brief amici curiae, which describes and develops the bases and reasons for that support.

Respectfully submitted,

Leo Pfeffer
Attorney for Amici Curiae

March, 1980

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BRIEF OF JEWISH PEACE FELLOWSHIP AND FELLOWSHIP OF RECONCILIATION, AMICI CURIAE

Interest of the Amici

The interest of the amici curiae is set forth in the foregoing motion for leave to file this brief and need not be repeated here.

Statement of the Case

The facts of this case, as determined by the referee and affirmed by the Employment Security Review Board (hereinafter, the Board) establish that petitioner, member of the Jehovah's Witnesses sect, left his employment at the plant of the Blaw-Knox Foundry and Machinery Company because it was engaged primarily in the manufacture of weapons. The Board nevertheless denied his claim for unemployment compensation on the ground that he voluntarily terminated his employment and that the fact that his action was impelled by his religious convictions was immaterial under the state's unemployment compensation law.

The Court of Appeals of Indiana set aside the action of the Board and directed it to enter an award in favor of petitioner. On appeal, however, a majority of the state's Supreme Court reversed the decision and ruled that the challenged ruling of the Board did not violate the Free Exercise Clause of the First Amendment, but on the contrary, an award of benefits would violate the Establishment Clause.

Question to Which This Brief Is Addressed

This brief is addressed to the question whether a state is constitutionally permitted or constitutionally mandated to deny unemployment compensation benefits by reason of a complainant's adherence to his religious conscience which forbids participation in the manufacture of weapons of war.

Summary of Argument

A statute which is construed to disqualify from unemployment insurance benefits one who because of his religious convictions will not engage in the manufacture of arms deprives him of free exercise of his religion. If the deprivation be deemed indirect, it is nevertheless within the compass of the First Amendment. It is constitutionally permissible only if clearly and immediately necessary for the avoidance of a grave danger to the national security and only if no method not infringing upon religious liberty is available to avoid the danger. This test cannot be met in the preesnt case, and accordingly the disqualification of the plaintiff unconstitutionally deprived him of rights secured by the First Amendment.

Moreover, non-disqualification of such a worker not only does not violate the Establishment Clause of the Amendment but, on the contrary, is mandated by it, since its principal and primary effect is to inhibit the religion to which the petitioner herein is committed.

ARGUMENT

Disqualification from unemployment insurance benefits of one who for reasons of conscience will not work producing weapons for war unconstitutionally deprives him of his freedom of religion and violates the Establilshment Clause.

Initially we note the assertion of the Indiana Supreme Court that the legislature intended to impose and did impose a stricter standard of eligibility for unemployment insurance benefits in respect to those who quit work than applicable to those who are unemployed and refuse available work. 391 N.E. 2d 1127 at 1130. This construction of the state's legislative intent is, of course, binding upon this Court. We suggest, however, that this difference in legislative intentions does not rise to constitutional standards.

This is what was held in *Lincoln* v. *True,* 408 F. Supp. 22 (W. D., Ky., 1975). There the claimant voluntarily terminated her employment of 21 years with a tobacco company because the elders of the Jehovah's Witnesses, the creed professed by Thomas in the present case, informed her that anyone using or working with tobacco was violating the Will of God and unless she resigned she would be expelled from the fellowship of Jehovah's Witnesses. The District Court cited *Sherbert* v. *Verner,* 374 U.S. 398 (1963) as controlling and held that the denial of benefits violated the claimant's right to the free exercise of her religion and ordered benefits to be paid.

The court below in the present case recognized that *Lincoln* v. *True* was indistinguishable from the present case, since it too involved not an applicant for employment but an employee who was discharged. It ruled, however, that the case was incorrectly decided and refused to follow it.

We agree that *Lincoln* v. *True* is indistinguishable from the present case, but we disagree with its conclusion that it was incorrectly decided. We believe the disposition in *Lincoln* was impelled by the decision in *Sherbert,* and that both were mandated by the Free Exercise Clause.

Although *Sherbert* v. *Verner,* 374 U.S. 398 (1963) involved a Seventh-Day Adventist who refused to accept tendered offers of employment because they would require her to work on her Sabbath, nothing in the Court's opinion indicates that there is any constitutional difference between that situation and the one before this Court in the present case. Indeed, *Sherbert* is analogous to the present case in that there the claimant lost her employment when the company changed from a five to six day workweek, requiring Saturday work, and in the present case Thomas was transferred from the roll foundry, which he believed was not involved in arms production, to the turret line, which patently was.

Freedom of religion, of course, is not absolute; no freedom secured by the First Amendment is. Nevertheless, First Amendment rights have over many years been accorded a preferred position in our constitutional scheme of things. While the right to abstain from participation in military service is undoubtedly within the purview of the Freedom of Religion Clause, it is, like all other First

Amendment rights, subject to abridgment where necessary for the defense of the nation. *Selective Draft Law Cases* (*Arver* v. *United States*), 245 U.S. 366 (1918). But, we submit, the determination whether that precious freedom should be abridged in the interest of national safety is a decision which should be made by the nation, acting through its legislature, rather than by individual states, acting through their legislatures or courts.

The assertion by the Indiana Supreme Court that according conscientious objector status to Thomas under the Free Exercise Clause would present a conflict between that Clause and the Establishment Clause, is not new. Exactly the same claim was asserted in the *Selective Draft Law Cases* in 1918. There the Court, in referring to a provision in the law that exempted from military service religious sects "whose tenets excluded the moral right to engage in war," said:

> . . . And we pass without anything but statement the proposition that an establishment of religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more. 245 U.S. at 389-390.

Exemption from military service of persons whose religious conscience forbids participation therein, has a long and honorable history. It goes back to the early days of the colony of Rhode Island and to Roger Williams, whose pamphlet, "*The Bloudy Tenet of Persecution for cause of Conscience, discussed in a Conference between Truth and Peace,*" has long been recognized as an epochal milestone

The court below in the present case recognized that *Lincoln* v. *True* was indistinguishable from the present case, since it too involved not an applicant for employment but an employee who was discharged. It ruled, however, that the case was incorrectly decided and refused to follow it.

We agree that *Lincoln* v. *True* is indistinguishable from the present case, but we disagree with its conclusion that it was incorrectly decided. We believe the disposition in *Lincoln* was impelled by the decision in *Sherbert,* and that both were mandated by the Free Exercise Clause.

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in our history not only of religious freedom but also the separation of church and state. More than a century before we became an independent nation, Rhode Island, in 1673, exempted from military service persons who had religious scruples against participation in war. A.P. Stokes, *Church and States in the United States,* vol. 1, pp. 755-756 (1950).

This practical understanding of the meaning of religious freedom and church-state separation has become the law of the land. From the earliest days our nation has accorded exemption from military services to persons whose religious conscience forbade participation in them, a mandate now codified in the Universal Military Training Service Act, 50 U.S.C. App. Section 456 (j). This section of the statute relates to active participation in armed conflict, obviously a more serious concern of national security than what is involved in the present case—civil employment in a plant that manufactures armaments.

The Indiana Supreme Court in the present case found itself faced with a dilemma arising out of "the conflict between the Free Exercise Clause under the First Amendment and the Establishment Clause of the First Amendment."

> . . . To hold [the Court said] that an employee who voluntarily quits work for personal reasons and personal beliefs which can somehow be described as religious beliefs, must be allowed benefits which other employees who voluntarily quit work for valid personal reasons or beliefs, which are not "religious" are denied benefits, would violate the Establishment Clause. 391 N.E. 2d at 1134.

Faced with this conflict, the Indiana Supreme Court opted in favor of no-establishment over free exercise. This

is somewhat surprising; constitutional authorities and dicta (there are no holdings directly in point) of this Court seem to indicate a contrary choice. See *Wisconsin* v. *Yoder,* 406 U.S. 205, 220-221 (1972); *Abington School District* v. *Schempp,* 374 U.S. 203, 296-299 (1963) (Brennan, J., concurring); L. Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment,* 64 Minn. L. Rev. 201 (1980).

The conflict, we suggest, is more apparent than real. It was asserted in *Sherbert* and there rejected by the Court. "In holding as we do," the Court said, "plainly we are not fostering the 'establishment' of the Seventh-Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religions with secular institutions which it is the object of the Establishment Clause to forestall." 374 U.S. at 409.

Exemption from military service of religious conscientious objectors is not the only instance of constitutional acceptability under the Free Exercise Clause of a practice seemingly inconsistent with the Establishment Clause. Use of tax-raised funds to pay for chaplains in the armed forces would appear to be violative of the Establishment Clause. James Madison, the father not only of the Constitution but also of the First Amendment, expressed that view in his *Detached Memoranda* (E. Fleet, *Madison's Detached Memoranda,* William and Mary Quarterly, October 1946). Madison, however, recognized at least a possible exception in the case of navies with insulated crews, who, as a prac-

tical matter, could not exercise that right to the free exercise of religion by going to a church or other house of worship. Today, soldiers serving away from their home towns are practically as "insulated" as navies, and it is because of this insulation that chaplains in the armed forces can be justified under the First Amendment's guaranty of religious freedom even though seemingly inconsistent with the Establishment Clause.

Indeed, it is possible to suggest even further that chaplains in the armed forces are not merely permissible under the Establishment Clause but are in fact mandated by the Free Exercise Clause. A soldier drafted into the armed forces and sent to camp far from home is deprived of his opportunity to visit his church or synagogue. To the extent that such deprivation is necessary to the over-riding consideration of national defense, it is constitutionally allowable. But it is constitutional only to the extent that it is necessary; and if the government can furnish a substitute in the form of a traveling church or chaplain, the soldier may have a Free Exercise right thereto notwithstanding the Establishment Clause.

The underlying premise of this proposition is that the free exercise of religion is the most precious of American liberties. Indeed, the history of the First Amendment establishes that it is the one that was most vigorously fought for and first achieved. Out of that freedom later came freedom of speech and of the press and of assembly and petition.

It is because of this that, as we have noted, our government has from the earliest time of its existence exempted

from compulsory military service persons whose religious conscience forbade them to bear arms. That exemption was a complete one; it encompassed a prohibition of imposing penalties, political or economic, upon those whose religious conscience forbade them to engage in armed conflict. Who can doubt the unconstitutionality of a law that sought to deprive conscientious objectors of the right to vote, not merely in national but even in state elections?

The same reasoning is applicable in the present case. Denying the petitioner herein the benefit of the unemployment compensation law realistically constitutes a penalization for adhering to his religious conscience. This, we submit, cannot be reconciled with the letter or spirit of the Free Exercise Clause.

We argue, however, even further than this. We submit that such denial violates also the Establishment Clause. Under that Clause, as it has been interpreted in *Everson* v. *Board of Education,* 330 U.S. 1 at 15 (1947), government, state or federal, is forbidden to punish any person for "entertaining or professing religious beliefs, for church attendance or non-attendance." As expressed in later cases, the test of constitutionality under the Establishment Clause mandates that the principal or primary effect of a law "must be one that neither advances *nor inhibits* religion." *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971) (emphasis added).

We respectfully urge that a law which denies a person benefits under an unemployment compensation law because of his religious conscience is one which "inhibits religion" and thus violates the Establishment Clause.

Conclusion

For the reasons set forth herein it is submitted that the Indiana statute as interpreted and applied herein violates both the Free Exercise and Establishment Clauses of the First Amendment and that the decision of the Indiana Supreme Court should therefore be reversed.

Respectfully submitted,

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